File: 05672010

CANADA

PROVINCE OF NEW BRUNSWICK

CAMPBELLTON PROVINCIAL COURT

B E T W E E N:

HER MAJESTY THE QUEEN

-v.-

GÉRARD COMEAU

BEFORE:	The Honourable Judge Ronald LeBlanc
HELD AT:	Campbellton, NB
DATE OF HEARING:	August 25, 26, 27 and 28, 2016
DATE OF DECISION:	April 29, 2016
APPEARANCES:	Mr. William Richards and Mrs. Kathryn Gregory, for the Attorney General of New Brunswick
	Mr. Arnold Schwisberg, Mr. Mikael Bernard and Mrs. Karen Selick, for the defendant

JUDGMENT

INTRODUCTION

1. Mr. Gérard Comeau of Tracadie, New Brunswick, is charged by way of Notice of Prosecution with *(translation)*: "did have or keep liquor not purchased from the Corporation" in Campbellton, New Brunswick, on October 6, 2012, an offence under section 134(b) of the New Brunswick *Liquor Control Act.*

2. The defence submits that section 134(b) of the *Liquor Control Act* is an unenforceable provincial law under which no one can be convicted. They claim it is of no force and effect as it contravenes section 121 of the *Constitution Act, 1867*.

3. The prosecution of course takes serious issue with this contention.

4. This Court is called upon to interpret section 121 of the *Constitution Act, 1867* and determine how it impacts on the defendant's rights.

FACTS

5. The parties agreed to the essential facts giving rise to the ticket issued to Mr. Comeau. An Agreed Statement of Facts was marked as Exhibit C-1 at the trial. Additional facts relating to the stop, the detention and the seizure of the alcohol in question were supplied by Constable Guy

Savoie, the police officer who intercepted Mr. Comeau's vehicle in Campbellton on the date in question.

6. On Saturday, October 6, 2012, Mr. Gérard Comeau, a resident of Tracadie in the Acadian Peninsula, drove to Pointe-à-la-Croix and the Listiguj First Nation Indian Reserve in the province of Québec in his automobile. These communities are directly on the other side of the Restigouche River after crossing the J.C. Van Horne Bridge from the city of Campbellton, New Brunswick.

7. Mr. Comeau was under surveillance by the RCMP once he arrived in the province of Québec. The RCMP Campbellton Detachment had enlisted the aid of their counterparts in Québec to assist in a project initiated by then Corporal René Labbé, the team leader of the project. There was no complaint filed with the RCMP which initiated the investigation; it was self-generated by the police force and was instigated as a crime-reduction initiative. The police were targeting people who had in excess of five cases of beer in their possession once they crossed the border. The operation involved surveillance by Québec RCMP of customers from New Brunswick at outlets selling liquor in Pointe-à-la-Croix or in Listiguj, following them in unmarked vehicles onto the bridge, radioing ahead to the local police force and providing them the licence plate number and description of the vehicle involved. The vehicle would then be stopped by members of the RCMP Campbellton Detachment and searched for the illegally possessed alcohol. The operation lasted two days. It is unknown how many tickets were issued for this type of infraction over the two-day span.

8. Mr. Comeau had gone to Pointe-à-la-Croix and Listiguj specifically to purchase alcoholic beverages at a cheaper price than that which he would have paid had he purchased the alcohol in New Brunswick. He was seen entering Wysote's Convenience Store, the Société des alcools du Québec and the Provigo Supermarket, all of which sold alcoholic beverages. He crossed the J.C. Van Horne Bridge into the province of New Brunswick, intending to return to his home in Tracadie.

9. His vehicle was intercepted on Val d'Amour Street in Campbellton. The police seized from the trunk of his vehicle the following:

- 2 cases of 24 bottles of Sleeman's Light beer;
- 2 cases of 24 bottles of Miller Genuine Draft beer;
- 2 cases of 24 bottles of Molson M beer;
- 3 cases of 20 bottles of Budweiser Light beer;
- 3 cases of 20 bottles of Budweiser beer;
- 3 cases of 30 cans of Coors Light beer;
- 2 bottles of whiskey, 750 ml per bottle; and
- 1 bottle of Stinger Premixxx liqueur, 1.4 litre.

10. The total alcohol seized was therefore 354 bottles or cans of beer and three bottles of liquor. Mr. Comeau was issued his ticket and was allowed to leave.

11. It was furthermore stipulated in the Agreed Statement of Facts that New Brunswickers purchase liquor from the province of Québec and transport it themselves into New Brunswick regularly. This particular aspect of the evidence was further highlighted by John Beckingham, a private investigator of 27 years' experience in the field who had been hired by the defendant to investigate the frequency of alcohol purchases by New Brunswickers in the province of Québec. He conducted his investigation over the course of six days during a two-week period in July and August of 2015 by taking photos, talking to employees and owners of either convenience stores or the Société des alcools du Québec, and generally observing the number of cars parked in the parking lots and taking note of their province of origin. He concluded from his observations that during the period in question approximately two thirds of the customers at these convenience stores or the Société des alcools du Québec had licence plates originating from the province of New Brunswick. Furthermore, at Wysote's Convenience Store, he noted that approximately ninety percent of the floor space was occupied by beer products.

THE LEGISLATION

12. The following are the applicable provisions of the *Liquor Control Act* of New Brunswick:

> **133 Except as provided by this Act or the regulations, no person shall have liquor in his possession within the Province.**
>
> **134 Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall**
> **(*a*) attempt to purchase, or directly or indirectly or upon any pretence, or upon any device, purchase liquor, nor**
> **(*b*) have or keep liquor,**
> **not purchased from the Corporation.**

> **43 A person who is not prohibited by law from having or consuming liquor may have and consume in a residence or in a roomette, duplex roomette, compartment, bedroom or drawing room occupied by him in a train, but not in a public place except when authorized under a permit,**
> **(*a*) any liquor that has lawfully been acquired by him under this Act from the Corporation,**
> **(*b*) liquor not in excess of one bottle or beer not in excess of twelve pints purchased outside Canada by him or by the person from whom he received it as a *bona fide* gift, or**
> **(*c*) liquor not in excess of one bottle or beer not in excess of twelve pints purchased outside New Brunswick from a liquor commission, board or similar body in any province or territory of Canada by such person or by a person from whom he received it as a *bona fide* gift.**
>
> **148(2) A person who violates or fails to comply with a provision of this Act that is listed in Column I of Schedule A commits an offence.**
>
> **148(3) For the purposes of Part II of the *Provincial Offences Procedure Act,* each offence listed in Column I of Schedule A is punishable as an offence of the category listed beside it in Column II of Schedule A.**

13. Under Schedule A, in Column I, section 134(b) of the *Liquor Control Act* is a category E offence. In New Brunswick, under the *Provincial Offences Procedure Act*, a category E "prescribed offence" carries, upon conviction, a minimum fine of $240.00. When one adds to that fine the 20% surcharge under the *Victim Services Act* of New Brunswick and the $4.50 administrative fee prescribed by regulation for the processing of tickets, the result is a fine of $292.50, which is the amount indicated on Mr. Comeau's ticket.

Section 199 provides an interpretive aid to the *Act*:

> **199(1) The purpose and intent of this Act are to prohibit transactions in liquor that take place wholly within the Province, except under control as specifically provided by this Act; and every section and provision of this Act shall be construed accordingly.**

> **199(2) The provisions of this Act dealing with the importation, sale, and disposition of liquor within the Province through the instrumentality of the Corporation, and otherwise, provide the means by which such control shall be made effective; and nothing in this Act forbids, affects, or regulates any transaction that is not subject to the legislative authority of the Province.**

14. Section 121 of the *Constitution Act 1867*, Stats. UK, 1867 (30 & 31 Victoria), c. 3, (the *Constitution Act, 1867*) provides as follows:

> **s. 121 All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.**

15. Section 63(1) of the New Brunswick *Provincial Offences Procedure Act* actually includes the possibility of a 30-day jail term for repeat offenders who commit a category E offence. It provides:

> **63(1) Where, in relation to a category E offence, a defendant is convicted of an offence and has a previous conviction for the same offence, the judge may, if satisfied that no other sentence will deter the defendant from repeating that offence, sentence the defendant to a term of imprisonment of not more than thirty days.**

16. Finally, sub-section 3(1) of the federal *Importation of Intoxicating Liquors Act*, R.S.C. 1985 c. I-13 will be referenced. It provides as follows:

> **3(1) Notwithstanding any other Act or law, no person shall import, send, take or transport, or cause to be imported, sent, taken or transported, into any province from or out of any place within or outside Canada any intoxicating liquor, except such as has been purchased by or on behalf of, and that is consigned to Her Majesty or the executive government of, the province into which it is being imported, sent, taken or transported, or any board, commission, officer or other governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor.**

THE POSITION OF THE PARTIES

THE DEFENCE

17. The defence submits that section 134(b) of the *Liquor Control Act* is not an enforceable provincial law as it constitutes a trade barrier that is contrary to section 121 of the *Constitution Act, 1867*. In pith and substance section 134(b) is a trade barrier, either tariff or non-tariff. They maintain that a purposive or a progressive interpretation of section 121 of the *Constitution Act, 1867* must lead the Court to conclude that section 121 requires free trade among provinces without trade barriers, tariff or non-tariff, regardless of whether the barrier is found in provincial legislation or federal legislation. They submit that the wording, legislative history, legislative context and the scheme of the *Constitution Act, 1867* all compel the Court to conclude that section 121 was intended to secure free trade among the provinces, whether existing or to be added. They further submit that a plain reading of the section allows for only one conclusion: free trade. They submit that the Supreme Court of Canada judgment in *Gold Seal Limited v. Dominion Express Company and The Attorney General of the Province of Alberta* [1921] S.C.J. No. 43 (hereinafter referred to as *Gold Seal*) and all other subsequent judicial decisions on section 121 should be rejected outright as they are wrongly decided and of doubtful value based on questionable practices by certain justices of the Supreme Court who participated in the *Gold Seal* case. Other aspects of these arguments will be addressed as they arise.

THE PROSECUTION

18. The prosecution asks the Court to address the fundamental structure of the Canadian Constitution and its relationship to the operation of the federation to determine whether section 134(b) of the *Liquor Control Ac*t violates section 121 of the *Constitution Act, 1867*. They maintain that rules of statutory interpretation support the conclusion that section 121 was intended to disarm only provincial laws requiring cross-border tariffs or duties. They argue that the Canadian Constitution is composed of both written rules (the *Constitution Act, 1867*, the amended and repatriated *Constitution* and various constitutional amendments) and unwritten rules called constitutional conventions that make a living constitution. The Constitution must continue to evolve in order to be responsive to the nature of the Canadian federation. They maintain that legislative co-operation is required as between the federal government and the provincial legislatures. They posit that federalism, one of the four foundational principles of the Canadian constitution, gives Canada its unique political character by recognizing the diversity of the component parts of the Constitution and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. They invite the Court to recognize the plurality of the modern nation state and acknowledge that this plurality is a rational part of the political reality in the federal process. They suggest this Court should adopt the statutory interpretation of section 121 as was decided by the Supreme Court of Canada in the *Gold Seal* case and they invite the Court to dismiss the arguments presented by the defence. Finally, the prosecution argues that it is the federal *Importation of Intoxicating Liquors Act*, not the provincial *Liquor Control Act*, that establishes prohibitions against the importation of liquor into

one province from another and since the defence has not challenged the federal *Act*, their argument should fail.

A PRELIMINARY ISSUE

19. This last mentioned argument from the prosecution, the one proposing a rejection based on lack of an attack on the federal *Act* was not, I believe, raised during oral argument. It flows from the Crown's Post-trial Brief. The defence, in their Reply Brief to the Crown's Post-trial Brief, states that they do not need to challenge the *Importation of Intoxicating Liquors Act* for the purposes of their defence because section 134(b) of the *Liquor Control Act* is independent of the *Importation of Intoxicating Liquors Act*. However, in the alternative, they argue that section 3 of the *Importation of Intoxicating Liquors Act* also violates section 121 of the *Constitution Act, 1867*.

20. I will not address the issue of whether or not section 3 of the *Importation of Intoxicating Liquors Act* violates section 121 of the *Constitution Act, 1867*. The *Importation of Intoxicating Liquors Act* is federal legislation. The federal government was never invited to participate in these proceedings. If the constitutionality of federal legislation is intended to be attacked, the federal government must be given the opportunity to participate and to respond. Beyond the basic common sense of this proposition, Rule 11 of the New Brunswick Rules of Provincial Court Practice required Notice of Application to have been served on the Regional Office of the Attorney General of Canada, which was not done. The Notice of Application filed was served on the local office of the Attorney General of New Brunswick only. That was not surprising since

the constitutional issue raised was: "Is section 134(b) of the *Liquor Control Act*, RSNB 1973, c. L-10, contrary to and in violation of section 121 of the *Constitution Act, 1867*?" No mention is made in that document to section 3 of the *Importation of Intoxicating Liquors Act*. Furthermore, the presiding judge was never asked to add further issues to the trial. As a consequence, for the purposes of my analysis, I limit my comments to section 134(b) of the provincial *Liquor Control Act*, and will not deal with the constitutionality of section 3 of the federal *Importation of Intoxicating Liquors Act*.

THE ISSUE

21. The issue is a simple one: whether section 134(b) of the *Liquor Control Act* of New Brunswick violates section 121 of the *Constitution Act, 1867*, and is therefore of no force or effect as against the defendant. This issue requires the Court to address the meaning to be attributed to the words "admitted free" found in section 121 of the *Constitution Act, 1867*. The simplicity of the issue is rivalled only by the complexity of the factors that the Court must consider in arriving at its conclusion. The very nature of the Canadian federation is at stake.

22. In arriving at a conclusion on this issue, the Court will examine the applicable rules of interpretation for constitutional documents and the legislative history of the *Constitution Act, 1867*, including the historic events giving rise to the "constitutional moment". The Court will also consider the context and scheme of the *British North America Act,1867* as it was proclaimed on July 1, 1867, as well as the relevant jurisprudence pertinent to section 121. The Court will also address the issue of whether the jurisprudence has been tainted by the infamous "Duff letter"

which figures prominently in the defence attack on the jurisprudential interpretations following the release of the *Gold Seal* decision.

SOURCES OF INFORMATION FORMING CONCLUSIONS

23. During the course of this decision, I will refer to certain facts. The proof of these facts derives from the testimony given by the various witnesses presented during the trial, the reports of the two expert witnesses, Dr. Andrew Smith and Dr. Thomas Bateman, filed as exhibits respectively D-6 and C-11, the other exhibits tendered at the trial, all of which were admitted with the consent of the opposing party, and finally by reliance on proof of facts by judicial notice. By judicial notice, I mean matters relating to the history of Canada that do not require to be proven because of their notoriety and indisputability or that are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. Regarding this last mentioned category of evidence, however, the Court was careful not to take judicial notice of any fact vital to the resolution of the case or of any other important fact in issue.

PLACING THE ISSUE IN PROPER CONTEXT

24. Section 134(b) of the *Liquor Control Act* is directed at the possession of liquor wholly within the province. It specifically does not prohibit importation of liquor from outside the province. The section provides that no person shall have in his possession liquor in the province that was not purchased from the Corporation.

25. The *Liquor Control Act* then allows for exceptions, one being in relation to liquor imported into the province from another province. That is found in section 43(c) of the *Liquor Control Act*, which allows for a person to have in his possession in this province one bottle of liquor or 12 pints of beer purchased from a liquor commission outside of this province. Although not raised by counsel at trial, a strict interpretation of this section allows for one or the other of the two types of liquor, not both. It actually provides for liquor or beer. This same section allows a person in this province to possess liquor in the province: section 43(a). The word "liquor" is defined in section 1 of the *Liquor Control Act* as follows:

> **"liquor" includes (boisson alcoolique)**
> **(a) any alcoholic, spirituous, vinous, fermented, malt or other intoxicating liquid or combination of liquids,**
> **(b) any mixed liquid, a part of which is alcoholic, spirituous, vinous, fermented, malt or otherwise intoxicating,**
> **(c) all drinks or drinkable liquids and all preparations or mixtures that are capable of human consumption and intoxicating, and**
> **(d) beer and wine,**
> **but does not include any beverage obtained by the alcoholic fermentation of an infusion or decoction of barley malt and hops or of any similar products in drinkable water and containing 0.5 per cent or less of proof spirits.**

26. Since the definition of "liquor" includes "beer", then one could argue the rather improbable result that a person could have in his possession, in compliance with section 43(c) of the *Liquor Control Act*, one bottle of beer or 12 pints of beer purchased from a liquor commission outside of this province.

27. Since the provincial legislation prohibits only the possession of liquor or beer purchased from outside the province in quantities exceeding the prescribed limit, it is not an offence under the New Brunswick legislation to transport the alcohol across provincial boundaries. It is the

Importation of Intoxicating Liquors Act, the federal *Act*, which prohibits importation of intoxicating liquors. However, it is impossible for section 134(b) of the *Liquor Control Act* to come into play unless and until the liquor or beer is transported across the provincial boundary. No one can be charged under section 134(b) unless someone transports liquor or beer across the provincial lines. Once the liquor or beer is in New Brunswick, in provenance from another province, that person can be charged with the unlawful possession of it if the amount exceeds that permitted by the provincial legislation.

28. The *Importation of Intoxicating Liquors Act* creates liquor monopolies across the country. It provides in part that no person shall import or transport into any province from any other province any intoxicating liquor unless that liquor has been purchased by the government of the province into which it is being transported or imported. Admittedly, this is a gross paraphrasing of the section, but it conveys the true import of it.

29. Section 134(b) of the *Liquor Control Act* and section 3 of the *Importation of Intoxicating Liquors Act* were the subject of debate in the New Brunswick Court of Appeal in the case of *R. v. Gautreau* [1978] N.B.J. No. 107. The facts in that case were not dissimilar to those in the present case. Mr. Gautreau had purchased 22 cases of beer in Québec and was on his way to his home in New Brunswick when he was stopped by the RCMP. The fact this occurred in 1977, almost 40 years ago, has not been lost on this Court. The applicable provincial and federal legislation in the *Gautreau* case were identical to the ones being argued in this case. The trial Judge in *Gautreau* expressed the tentative opinion that section 134 of the *Liquor Control Act* was possibly ultra vires the Provincial Legislature as legislation impinging upon federal jurisdiction

over trade and commerce. Section 121 was not argued. The Court of Appeal dealt with the case on the basis of harmony between conflicting enactments. It decided, at paragraphs 9 and 11:

> **9 "There is, therefore, no conflict between the federal act prohibiting the importation of liquor into a province and the prohibition of the Liquor Control Act of having or keeping liquor in the province not purchased from the Corporation. The two prohibitions are separate and distinct. Clearly a person may violate the prohibition against having or keeping liquor not purchased from the Corporation and which has been imported into the province in violation of the Importation of Intoxicating Liquors Act without violating the provisions of that Act. It is also apparent that a violation of the Federal Act against importing liquor may, in certain circumstances, involve a violation of the prohibition against having or keeping liquor not purchased from the Corporation. This, in my opinion, does not involve the doctrine of paramountcy because, to use the words of Mr. Justice Judson in O'Grady v. Sparling, [1960] S.C.R. 804, at 811, "both provisions can live together and operate concurrently".**
>
> **11 In the instant case s. 3 of the Importation of Intoxicating Liquors Act is unquestionably valid legislation and s. 134(b) of the Liquor Control Act is prima facie intra vires. Since there is no conflict between them, in the sense that they can stand together, the latter provision is not affected by the doctrine of paramountcy".**

30. Importantly, the Court applied an earlier ruling from the Judicial Committee of the Judicial Council that held that a provincial legislature has no power or authority to prohibit the importation of intoxicating liquor into a province. It also applied the *Gold Seal* case. I refer to paragraph 6:

> **6 "It is well established by a series of judicial decisions that while Parliament and the Legislature together have complete legislative authority to regulate and control traffic in intoxicating liquor, certain aspects of the control fall solely in the authority of Parliament. Thus in A.G. Ont. v. A.G. Canada, [1896] A.C. 348 the Judicial Committee held that a provincial legislature has no power or authority to prohibit the importation of intoxicating liquor into the province. The**

> **question was again dealt with in Gold Seal Ltd. v. Dominion Express Co. (1921), 62 D.L.R. 62 when the Supreme Court of Canada held that Parliament had power to prohibit the importation of intoxicating liquor into Alberta under its general power under s. 91 of the British North America Act "to make laws for the peace, order and good government of Canada" as well as under its jurisdiction to regulate trade and commerce under s. 91(2)".**

31. Additional evidence was presented to this Court regarding what I would call collateral issues. These include the Maritime Beer Accord, the *Agreement on Internal Trade* – an attempt to create a policy changing the amount of alcohol a person could bring into New Brunswick – and discussions between Ministers regarding amending the *Importation of Intoxicating Liquors Act*. I will deal with these briefly, since none of them deal directly with the issue of the interpretation of the impugned legislation.

32. The Maritime Beer Accord is nothing more than the result of a handshake deal made in 1993 between Frank M^{c}Kenna, then Premier of New Brunswick, and John Savage, then Premier of Nova Scotia, to bypass the controls imposed by the provinces as a result of the *Importation of Intoxicating Liquors Act*. If a brewer wanted to sell beer in a province, they had to have a brewery in the province. Both Moosehead and Labatt's had breweries in New Brunswick and Nova Scotia. The Premiers agreed that Moosehead would close their plant in Nova Scotia and Labatt's would close their plant in New Brunswick yet both would retain the privileges associated with still having a plant in both provinces. With this agreement, beer produced in Nova Scotia was treated exactly the same as beer produced in New Brunswick. The same applied for Nova Scotia produced beer. The resulting reciprocal treatment applied to the listing, pricing, distribution and marketing of beer and access to points of sale. Currently, the situation

in New Brunswick is that beer produced in Nova Scotia or Prince Edward Island is treated exactly like beer produced in New Brunswick whereas beer produced in Ontario and Québec are not. Beer produced by brewers in the last two mentioned provinces, and all other provinces, is handled through the Alcool NB Liquor (the *ANBL*) warehouse, which attracts a warehouse handling fee, which would be considered, no doubt, to be a tariff trade barrier.

33. Efforts to remove trade barriers also arose out of discussions leading up to the *Agreement on Internal Trade*, admitted into evidence as Exhibit C-7. The *Agreement on Internal Trade Implementation Act*, S.C. c. 17, is the legislated result of those discussions.

34. The preamble of the *Agreement on Internal Trade* states in part the following:

> **"RESOLVED to:**
>
> **REDUCE AND ELIMINATE, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada;"**
>
> **Articles 100, 402 and 404 state the following:**
>
> **Article 100: Objective**
> **"It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal."**
>
> **Article 402: Right of Entry and Exit**
> **"Subject to Article 404, no Party shall adopt or maintain any measure that restricts or prevents the movement of persons, goods, services or investments across provincial boundaries."**
>
> **Article 404: Legitimate Objectives**

> **"Where it is established that a measure is inconsistent with Article…402…that measure is still permissible under this Agreement where it can be demonstrated that:**
>
> a) **the purpose of the measure is to achieve a legitimate objective;**
>
> b) **the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;**
>
> c) **the measure is not more trade restrictive than necessary to achieve that legitimate objective; and**
>
> d) **the measure does not create a disguised restriction on trade".**

35. Article 402, the right of entry and exit, is specifically excluded from operation in the case of alcoholic beverages: article 1000(1).

36. The preamble to the federal *Agreement on Internal Trade Implementation Act* specifies the following:

> **"…AND WHEREAS the reduction or elimination of barriers to the free movement of persons, goods, services and investments is essential for the promotion of an open, efficient and stable domestic market to enhance the competitiveness of Canadian business and sustainable development;"**

37. Mr. Richard Smith, the prosecution witness who testified about the *Agreement on Internal Trade* and its implementation, was not an expert in the field and only had a rudimentary knowledge of its contents. Being the Senior Vice President, Chief Operating Officer and Secretary of the Board of Directors of the ANBL however, he did have knowledge about current liquor practices, particularly involving New Brunswick. To cursorily and perhaps unduly summarize his testimony on the Maritime Beer Accord and the implementation of the *Agreement on Internal Trade* in this province, New Brunswick continues to respect the handshake deal with Nova Scotia and Prince Edward Island on beer distribution notwithstanding Nova Scotia's

reticence to reciprocate, and because New Brunswick is of the opinion that there are discriminatory practices in Québec and Ontario in relation to alcohol products, this province retains its discriminatory practices against products made in their jurisdictions (transcript, vol. 1, page 56).

38. Mr. Smith also testified about Exhibit C-4, a submission to the Board of Directors of ANBL in October of 2011 dealing with a resolution to approve a change to the existing New Brunswick legislation on interprovincial travel importation of liquor. In June of 2011, the Canadian Association of Liquor Jurisdictions had approved a resolution supporting the ability of individuals to transport on their person, and for their personal use, reasonable quantities of liquor across provincial and territorial boundaries within Canada, subject to the *proviso* that each jurisdiction would determine what quantity of liquor was reasonable. Subsequent conference calls were held amongst the jurisdictions resulting in most implementing or adopting policies to support the resolution. The policy change was adopted by the Board of ANBL at its October 14, 2011, meeting. The policy adopted was identical to that adopted in Nova Scotia, and matched quantities adopted in Ontario and Nova Scotia. The policy adopted stated:

> **"New Brunswick residents returning home from travel within Canada may have reasonable quantities of beverage alcohol, obtained elsewhere in Canada for personal use, accompany them on their person without penalty.**
> **For the purposes of this policy, "reasonable quantities" are defined as:**
>
> 1. **Spirits: 3 litres;**
> 2. **Wine: 9 litres;**
> 3. **Beer: 24 litres.**
>
> **Amounts in excess of these limits shall not be permitted and are to be obtained via the ANBL special order process".**

39. It would appear that, flawed language notwithstanding, such a policy represented national standards. The Department of Public Safety, responsible for the *Liquor Control Act* in New Brunswick, did not actively pursue the request for modification to its legislation. The proposed 24 litres of beer represents the equivalent of 70 bottles, apparently.

40. Finally, a great deal of interest was generated by the initiative of the province of British Columbia to amend the *Importation of Intoxicating Liquors Act* by proclamation of Bill C-311. Exhibit C-6 represents the opinions expressed in the attached letters by certain of the politicians in the Maritime Provinces to the proposed enactment. The provinces of Nova Scotia, Prince Edward Island and New Brunswick, at least as regards the dates of the forwarding of these letters, all opposed the proposed amendment. That amendment would have facilitated direct delivery of wine products to consumers in all provinces. The provinces felt that supporting the proposal would endanger a reliable source of revenue. Bill C-311 allowed for importation of wine into another province provided that the individual complied with the laws of the receiving province, and that it be for personal consumption only.

THE INTERPRETATION OF CONSTITUTIONAL DOCUMENTS

41. As was so aptly stated by Justices Cromwell and Karakatsanis in *Québec (Attorney General) v. Canada (Attorney General)* [2015] 1 S.C.R. 693 in paragraph 3, "…the courts are not to question the wisdom of legislation but only to rule on its legality".

42. The Constitution of Canada requires a "flexible interpretation" so that it can be adapted over time to changing conditions. This is the source of what has been called the "progressive

interpretation" as explained by Lord Sankey's use of a colourful metaphor in *Edwards v. A.-G. Canada* [1930] A.C. 124. He described the Constitution of Canada as "a living tree capable of growth and expansion within its natural limits". He stated that the Constitution of Canada must not be "cut down" by "a narrow and technical construction" but rather should be the subject of "a large and liberal interpretation". This "living tree" metaphor has been applied by the Supreme Court of Canada in many cases, including *A.G. Québec v. Blaikie* [1979] 2 S.C.R. 1016, a case involving language rights, *A.-G. B.C. v. Canada Trust Co*. [1980] 2 S.C.R. 466, a case involving the taxation power and *Re Residential Tenancies Act* [1981] 1 S.C.R. 714, a case involving the interpretation of section 96 of the *Constitution Act, 1867*.

43. In the *Same-Sex Marriage Reference* [2004] 3 S.C.R. 698, the question before the Supreme Court of Canada was whether Parliament's power over "marriage" extended to legalizing same-sex marriages. The issue of the need to interpret the Constitution by reference to the applicable norms at the time of Confederation came into play. In 1867, the prevailing view was that marriage was by its very nature a union between a man and a woman. There were no exceptions to this. Homosexual acts were illegal, even as between consenting adults. The Court said at paragraph 22, in response to the argument that the *Constitution Act, 1867* effectively entrenched the common law definition of "marriage" as it stood in 1867, that:

> **22 "…The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life…"**

At paragraph 23, the Court continued:

> **23 "A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted…"**

44. The reason for this adaptive interpretation is explained by Professor Peter Hogg in the Constitutional Law of Canada, 5th Edition at page 36-26 as follows:

> **"It is never seriously doubted that progressive interpretation is necessary and desirable in order to adapt the Constitution to facts that did not exist and could not have been foreseen at the time when it was written".**

45. Judicial interpretations must change as society's values change and evolve. This is inevitable. Consequently courts must not adopt inflexible interpretations rooted in the past. On the other hand, progressive interpretations must not "liberate the courts from the normal constraints of interpretation", per Hogg, J, supra at 15-50. He states:

> **"…Constitutional language, like the language of other texts, must be "placed in its proper linguistic, philosophical and historical contexts" *(citing R v Big M Drug Mart [1985] 1 S.C.R. 295 at 344, per Dickson, J)*. Nor is the original understanding (if it can be ascertained), irrelevant. On the contrary, the interpretation of a constitutional provision "must be anchored in the historical context of the provision" *(citing R v Blais [2003] 2 S.C.R. 236).* All that progressive interpretation insists is that the original understanding is not binding forever… contemporary courts are not constrained to limit their interpretations to meanings that would have been contemplated in 1867 (or whenever the text was created)".**

46. The prosecution has insisted on this point in their presentation. As Professor Hogg has stated at page 60-9 of his text:

> **"The principle of progressive interpretation means that the views of the framers about the meaning of particular provisions of the constitutional text become less and less relevant with the passage of time. As Beetz, J. has pointed out, legislative history is a "starting point", but it cannot be conclusive in interpreting "essential dynamic" provisions *(citing Martin Service Station v MNR [1977] 2 S.C.R. 996 at 1006)".***

47. The last mentioned principle no doubt arises from the following, found in Mister Justice Beetz' judgment in the *Martin Service Station* case, supra:

> **"…Legislative history provides a starting point which may prove helpful in ascertaining the nature of a given legislative competence; but, as is shown by the history of legislation relating to bankruptcy and insolvency and by the interpretation of the jurisdiction of Parliament in this matter, it is seldom conclusive as to the scope of that competence for legislative competence is essentially dynamic".**

48. Post-Charter cases involving interpretation of the Constitution stress a "purposive interpretation" – see for example *R. v. Kapp* [2008] S.C.C. 41 at paragraph 82. This requires the Court to examine the actual wording of the section involved, its legislative history, the scheme of the *Act* and the legislative context. The interpretation should be a generous rather than a legalistic one which, while not overshooting the actual purpose of the legislation in question, must be placed in its proper linguistic, philosophic and historical context: *R. v. Big M. Drug Mart* [1985] 1 S.C.R. 295 at paragraph 117.

THE WORDING OF SECTION 121 OF THE *CONSTITUTION ACT, 1867*

49. What must be determined is the meaning to be attributed to the words “admitted free” in section 121: “All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces”.

50. The defence posits that a liberal interpretation of these words leads one to conclude that all articles grown, produced or manufactured in one province of Canada must be admitted free into another province of Canada because, based on either a progressive or a purposive interpretation of the Constitution, the section mandates free trade among provinces without any barriers, whether the barrier be tariff or non-tariff and whether the barrier is found in federal or provincial legislation.

51. The Supreme Court of Canada in *Gold Seal* has said otherwise. They have said that section 121 does nothing more than protect the movement of Canadian goods against interprovincial “custom duties” or “charges”. This interpretation has been applied in Canada by all provinces and territories for over 95 years.

52. Yet this is decidedly not what was intended by the Fathers of Confederation. The historical context of the section in question was very ably and thoroughly described at trial by one of the world’s most renowned experts on the constitutional moment, Dr. Andrew D. Smith, whose credentials were unimpeachable and whose testimony was beyond reproach. I accept his

testimony without hesitation and will refer to it in more detail later in this judgment when I address the issue of the historical context of the challenged section.

53. Addressing myself to the wording used in the section, the question then becomes, was the *Gold Seal* qualifier "admitted free *from custom duties or charges*" justified? There is certainly nothing in the plain reading of section 121 to suggest that the words "admitted free" meant admitted free from custom duties or charges. Those words do not form any part of the section.

54. Dr. Smith provided some important background information concerning the drafting of section 121 which I accept as having shed some light on its proper interpretation. The *British North America Act, 1867* (UK), renamed the *Constitution Act, 1867* by the *Constitution Act, 1982* was an enactment of the Parliament of the United Kingdom. It created the federal nation of Canada in 1867 by uniting the provinces of Canada (now Ontario and Québec), Nova Scotia and New Brunswick into a single « Dominion » it named Canada. The *British North America Act, 1867* was the culminating legislation emanating from agreements and discussions arising from conferences held in Charlottetown in 1864, Québec City in 1864 and in London, England in December 1866.

55. The "constitutional moment" is the expression used to describe the statements and the actions of the framers of the *British North America Act, 1867* during the period from June 1864 to March 1867, the period of time when the entirety of the details of that *Act* were being worked out between the various participants.

56. A rough draft constitution, called the Québec Plan of Union, was produced by the Fathers of Confederation at the Québec conference in the fall of 1864. That draft was modified at the constitutional conference held in London, resulting in the London Resolutions of 1866. It was further subsequently refined as the Fathers of Confederation continued to develop the plan, resulting in the bill that was presented to the British Parliament in February and March 1867.

57. Section 121 of the *British North America Act, 1867*, as well as other parts of that bill, was drafted by a British government lawyer named Francis Savage Reilly. Dr. Smith testified that Frank Reilly was born in Dublin in 1825, was called to the English bar in 1851 and specialized in insurance cases and commercial arbitration. He lived in London. Two versions of section 121 were drafted by Frank Reilly. The initial draft, numbered 125, read like this:

> **125 All Articles the Growth or Produce or Manufacture of Ontario, Québec, Nova Scotia, or New Brunswick, shall be admitted free into all Ports in Canada.**

The final draft, section 121, which was enacted, reads as follows:

> **121 All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.**

58. As can be seen, and as confirmed through the testimony of Dr. Smith, there are two striking differences between the two drafts.

59. Firstly, the section 125 draft mentions specifically that the articles of growth, produce or manufacture of Ontario, Québec, Nova Scotia or New Brunswick was to be admitted free. The specific provinces were named. The reference to these specific provinces was deleted in the

redrafted section 121, which refers to all articles of growth, produce or manufacture of “any one of the provinces”. The striking out of the names of the four provinces was, in his opinion, not accidental. The Fathers of Confederation clearly had expansion in mind. They were thinking forward to further provincial annexations and consequently did not want to bind only the four provinces mentioned in section 125. The articles “of any one of the provinces” were consequently to be admitted free into each of the other provinces, regardless of the date they formed part of the Dominion of Canada.

60. Secondly, the words “into all ports in Canada” were deleted. This change also demonstrates that the framers of the Constitution were forward looking individuals. This change indicates that the Fathers of Confederation were thinking about land-based trade, not just water-based trade. Dr. Smith testified that by getting rid of that restriction, the Fathers of Confederation were looking in the direction of a “more comprehensive economic union” (transcript, vol. 3, page 34). The drafting took into consideration that in the 19th century, technology was advancing rapidly and had the effect of “shrinking” the world. Roads were being built. Huge bridges spanning great distances over rivers were being constructed, including one over the St. Lawrence River. Railroads were going to be connecting the provinces one to the other. Electric telegraph was making it easier for businessmen to interact with each other over great distances. All of which prompted the Fathers to seek a more comprehensive economic union, “an attempt to create unfettered exchange” and to “tie the hands of future generations of Canadian politicians, federal and provincial”, according to Dr. Smith (transcript, vol. 3, page 36).

61. There is another important facet of this study into the wording used in the *British North America Act, 1867*. In order to determine the intention of the drafters of section 121, Dr. Smith referred us to legislation in the British colonies that were in existence prior to Confederation. Each of the colonies of Nova Scotia, New Brunswick and the Province of Canada had drafted legislation in an attempt to eliminate trade barriers between them. They had, according to Dr. Smith, passed laws "intended to set the legislative basis for a free trade agreement" (transcript, vol. 3, page 37). The Nova Scotia and the New Brunswick Acts in question were called *An Act in relation to the Trade between the British North America Possessions* (SNS 1848 (10 & 11 Vict.) c. 1 and SNB 1850 (13 Vict.) c. 2). The Province of Canada had a title even more telling: *An Act to facilitate Reciprocate Free Trade between this Province and other British North American Provinces* (S. Prov. C. 1850 (13 & 14 Vict.) c. 3)

The New Brunswick legislation was passed March 30, 1848. It read as follows:

> **"Whereas it is desirable that the Trade between the British North American Possessions of Canada, Nova Scotia, Prince Edward Island, Newfoundland, and New Brunswick, should be conducted in the most free and unrestricted manner;**
>
> 1. **Be it enacted by the Lieutenant Governor, Legislative Council and Assembly, That whenever from time to time the importation into any other of the British North American Provinces hereinbefore mentioned, of all articles, the growth, production or manufacture of this Province (excepting Spirituous Liquors) shall by Law be permitted free from Duty, His Excellency the Lieutenant Governor, by and with the advice of Her Majesty's Executive Council, shall forthwith cause a proclamation to be inserted in the Royal Gazette, fixing a short day thereafter, on which the Duty on all articles (excepting Spirituous Liquors) being the growth, production, or manufacture of any such Province as aforesaid, (excepting Spirituous Liquors) into which the importation of all articles, the growth, production or manufacture of this Province, shall be so permitted free from Duty, shall cease and determine; and from and after the day so limited and appointed, all such articles, the growth, produce or manufacture of any such Province, in such Proclamation to be named, (excepting**

Spirituous Liquors), shall be admitted into this Province Duty free, upon such proof of origin and character as may from time to time be required in and by any Order of the Lieutenant Governor in Council".

62. Each of the Acts had similar wording. Dr. Smith referred to this as "reciprocal free trade" (transcript, vol. 3, page 38), through a complex mesh of lateral and multilateral agreements as between the North American provinces. He made the point that there were many people in British North America who were familiar with the principle of "admitted free from duty". Certainly the politicians of the day, including the Fathers of Confederation, would have been aware of the difference between "admitted free" and "admitted free of duty".

63. The words "All articles of the Growth, Produce or Manufacture" found in section 121 of the *British North America Act, 1867* certainly mirrors that found in the three proclamations in pre-Confederation Canadian provinces. I find that significant. In drafting our Constitution, Mr. Reilly used wording similar to the legislative language used in New Brunswick, Nova Scotia and Canada to propagate interprovincial trade between the provinces. Most importantly, he did not include the words free "from duty". Dr. Smith stated that for contemporaries, the term "admitted free" had a different meaning than "admitted free of duty". To him, "admitted free" had a broader, more comprehensive, more robust meaning, referring to the expressions it "Has to be allowed in, has to be waived in" (transcript, vol. 3, page 39 and 40). This was no accident in his opinion. The use of the words "admitted free" strengthened the phrasing of the sentence to more accurately reflect the values, ideas and principles of the drafters of the *British North America Act, 1867*.

64. I will now examine the placement of section 121 in the structure of the *British North America Act, 1867* to determine if there are any significant conclusions that could be reached about its meaning based on its placement in the Act.

65. Section 121 of the *Constitution Act, 1867* is in Part VIII of the *Act*, under the heading "Revenues, Debts, Assets, Taxation". These sections (102 to 126) dealt with sundry items such as the creation of a Consolidated Revenue Fund, the interest on provincial public debts, the salary of the Governor General, assets, debts, ownership of public property, grants to the provinces, the continuance of Customs and Excise laws, etc.

66. Dr. Smith was of the opinion that the placement of section 121 in Part VIII of the *Act* was significant because it was disconnected deliberately from sections 91, 92 and 93 of the *Act*. These are the sections that deal with the distribution of powers as between the federal and provincial governments. These address jurisdictional questions. Section 121 on the other hand is placed with what he referred to as "the physical side of Confederation" being division of assets, national debt and so forth (transcript, vol. 3, page 57 and 58). Dr. Smith was of the opinion that when the Fathers of Confederation were addressing the drafting of section 121 of the *British North America Act, 1867*, they were thinking about the revenue sources of governments, focusing on what would be a legitimate revenue source for a government and what wouldn't. Part VIII also deals with the transition from one form of government to another and involves a transition period.

67. The prosecution takes the position that the 24 sections in Part VIII are in generic terms referencing matters of revenue or money. It advances the theory that since section 121 is placed in the same Part as sections 122 to 124, which deal with the continuation of certain customs and excise taxes and duties until they are altered by the new Government of Canada, the position advanced by Dr. Smith is not sustainable.

68. I find neither the heading, nor the placement of section 121 in Part VIII of the *Act* to be of any particular benefit in arriving at a conclusion as to its meaning. The section deals with the subject of trade as between the provinces. It had to be placed somewhere in the *Act* and its placement in Part VIII was perhaps nothing more than not having another Part in which to more appropriately place it. The various headings were as follows: Part I: Preliminary; Part II: Union; Part III: Executive Power; Part IV: Legislative Power; Part V: Provincial Constitutions; Part VI: Distribution of Legislative Powers; Part VII: Judicature; Part IX: Miscellaneous Provisions; Part X: Intercolonial Railway and Part XI: Admission of Other Colonies. Indeed, it would have been preferable to give the section its own Part since it deals with a topic not neatly or clearly belonging to any of the others.

69. Having closely examined the wording of the section, I conclude that there is nothing in the wording used in section 121 of the *Constitution Act, 1867* that would lead one to infer that the Fathers of Confederation intended to restrict the words “admitted free” to “admitted free of customs duties or charges”. Indeed, the opposite is the conclusion I would reach. The fact that the language used is similar to that found in provincial enactments in the provinces of Canada at the time and the fact that the section does not use the words “free of duty” as is used in those

provincial enactments and in other sections in the same Part of the *British North America Act, 1867* have convinced me that the wording used in section 121 suggests free trade, not "admitted free of customs duties or charges".

HISTORICAL CONTEXT

70. I will now examine in some detail the historical context of section 121 of the *Constitution Act, 1867*.

71. The preamble to the *British North America Act, 1867* includes the following two paragraphs:

> **"Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:**
>
> **And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire…"**

72. This vision of the Dominion of Canada having a Constitution similar in principle to that of Great Britain plays a key role in the interpretation of historical events giving rise to the proclamation of the *British North America Act, 1867*. The Fathers of Confederation specifically espoused what was familiar to them and rejected any notion of an American-style of government. The influence of the governmental policies of Great Britain relating to administration, management and trade were key to what the Fathers wanted to accomplish here in Canada. The *British North America Act, 1867* did not make any major break with colonial past. Independence from the United Kingdom was neither sought nor contemplated. The newly-created Dominion of

Canada remained a colony of the United Kingdom. Indeed, the resolve to remain attached to the United Kingdom was so strong that the Fathers of Confederation did not include an amending formula for the *Act*. Clearly they wanted continuity.

73. According to Dr. Smith, they also wanted to create inter-colonial free trade. That, in fact, was an important motivation for Confederation. The historical background to be addressed in this part of my decision derives primarily from the testimony of Dr. Smith and from his report. The historical context was not disputed by the prosecution.

74. The positive benefits of free trade and the negative effects of trade impediments, also called "non-tariff trade barriers" were well known to the Fathers of Confederation and to the politicians in Great Britain during the events leading up to Confederation. Both shared the philosophy that the creation of a true common market embracing all of the North American colonies would be beneficial.

75. For the purposes of the trial in this matter, a "tariff barrier" was defined as a tax or a payment of money assessed on the basis of the weight or volume of the product or as a percentage of the value of the product entering the jurisdiction in question. It adds to the cost of imported goods and is one of several trade policies that a country can enact. A "non-tariff barrier" was not specifically defined but examples were given. They can come in a variety of forms, all of which refer to restrictions that result from prohibitions, conditions, or specific market requirements that make importation or exportation of products more difficult or more

costly. Government action in the form of laws, regulations, policies or restrictions can effectively increase costs and form non-tariff barriers to trade.

76. There was a wide range of motives for the creation of a unified Canada, many of which related to economic development. Since 1854, ten years before the movement towards Confederation began in earnest, the people in British North America – in those provinces now known as Ontario, Québec, Nova Scotia and New Brunswick – had prospered economically by exporting their natural products to the United States under the terms of the Reciprocity Treaty. It was a period of tremendous prosperity for the people of British North America. Lord Elgin on behalf of Great Britain and its North American colonies and the United States Secretary of State, William Marcy signed this Reciprocity Treaty on June 5, 1854. Its effect was to eliminate customs tariffs thereby giving the North American colonists relatively unfettered access to the US market. The basic bargain was this: American fishermen were allowed to fish in British colonial waters and, in return, British North Americans got the benefits of free trade with the United States of America. They could send their timber, fish, minerals and agricultural products across the border into the lucrative US market.

77. The economy of the British colonies surged ahead because of this relatively unfettered access to the US market. It gave rise to a period of tremendous optimism in British North America and generated extensive economic development including, for example, the building of railways and the opening of banks. Notwithstanding some opposition in the United States, most Americans favoured the continuation of the Reciprocity Treaty. That changed, however, with the outbreak of the civil war in the United States, which lasted between April 12, 1861 and May 9,

1865. Many Americans perceived British North Americans as sympathizing with the Southern Confederacy. Rightly or wrongly, they attributed blame to them for helping the south in the US Civil War. This resulted in the United States imposing a battery of non-tariff barriers for goods imported from the British colonies.

78. US Customs officials began what has been described as the "search and detain" protocols. These had the effect of delaying the transporting of goods across the US border. Increased paperwork, assertive inspections, passport requirements and other means were used to delay the crossing of goods, all of which resulted in increased costs to the exportation of goods to the US market, thereby constituting non-tariff barriers to trade. Between 1864 and 1865, there was increasing pressure emanating from the United States to abrogate the Reciprocity Treaty. British North American politicians complained bitterly about the search and detain protocols. However, being a colony and not a sovereign country at the time, they had no ambassador in the United States to speak on their behalf. They turned to the British government for help. Lord Lyons, the Senior British diplomat in Washington at the time, spent a great deal of time attempting to resolve the issue. Indeed, he later recalled that during this period he spent more time dealing with British North American issues than he did with British issues.

79. Dr. Smith emphasized the importance of this topic. This issue of non-tariff trade barriers and tariff trade barriers was uppermost in the minds of Canadian politicians during the constitutional moment. The Fathers of Confederation clearly understood the distinction between the two because of current events giving rise to the repeal of the Reciprocity Treaty.

80. Repeal required a 12-month notice period. In March 1865, notice was given. The Reciprocity Treaty ceased to be operative on March 17, 1866. As of that date, there was no longer free trade between the United States of America and the colonies of British North America.

81. The vast majority of people in the British North American colonies wanted a return to reciprocity. Indeed, in the 1860s and early 1870s the government of John A. M^{ac}Donald repeatedly attempted to negotiate a new Reciprocity Treaty with the United States. His goal of restoring reciprocity enjoyed overwhelming support in Canada. The British government also wanted its North American subjects to be able to trade freely with the United States but were unable to achieve that end. This gave rise to a search for an alternate mode of economic development. The search was in earnest for alternative markets. The strategy adopted, according to Dr. Smith, was internal free trade within the boundaries of British North America.

82. During this time, British North Americans were also discussing their constitutional future. Discussions between the three Maritime Provinces, New Brunswick, Nova Scotia and Prince Edward Island, had been scheduled to take place concerning a political and economic union between them. The Fathers of Upper Canada (now Québec and Ontario) got wind of their discussions and attended the Charlottetown Conference for discussions between September 1 and September 7, 1864. This first conference brought together 23 delegates from Upper Canada, New Brunswick, Nova Scotia, and Prince Edward Island. The Fathers from Upper Canada were able to convince the other provinces that if a union of their three provinces was a good idea, then the union between all provinces would be a better one. They discussed a comprehensive union

that would include not only the provinces represented, but also the possibility of other provinces to be annexed over time. The Maritime Fathers ultimately agreed to the proposal.

83. The discussions resumed at the Québec conference in Québec City between October 10 and 27, 1864. This second meeting was attended by 33 delegates representing the original participating provinces plus two delegates from Newfoundland. The representatives expanded on the Charlottetown discussions, which resulted in a series of 72 resolutions known as *The Québec Resolutions*. It was there that the Fathers of the Confederation drafted the first Constitution of Canada.

84. These resolutions dealt in part with the distribution of powers between a new federal government and the provinces, the division of Upper Canada into two provinces to be named Ontario and Québec, and the financial structure of the new Dominion. It also required the new federation to build an intercolonial railway. While the Newfoundland and Prince Edward Island representatives withdrew from the project, those from Nova Scotia, New Brunswick and Upper Canada agreed to submit the resolutions to their assemblies for approval.

85. The third and final conference was held in London, England, from December 1866 to March 1867. It led to the adoption of the final version of *The Québec Resolutions*. The task of converting the rough plan of a proposed Constitution into a working enactment began. The attending Fathers of Confederation were assisted by British politicians including Henry Herbert, the 4th Earl of Carnarvon who in 1866 had been appointed Secretary of State for the Colonies, and, of course, Francis Reilly.

86. The British, who were asked to present an enactment establishing a new country with a new constitution, were expected to express the resolutions in clear, eloquent legislative form. There followed various drafts of the sections to be proclaimed. The wording became more refined; sections were moved around and renumbered. The British wanted the legislation to reflect the wishes of the Fathers of Confederation, mature and knowledgeable men who had a vision, who had the right to determine their own constitutional destiny and who sought a self-governing autonomous country that would continue to be part of the British Empire.

87. The Canadian colonies were in good hands. The British had much experience and the required expertise to assist in the drafting of the proposed Constitution. At the time of Confederation, the British were considered to be experts in diplomacy and trade negotiation. They knew how to write a document such as that sought by the British North Americans.

88. The *British North America Act, 1867* introduced into the British Parliament by Lord Carnarvon on February 12 and approved by Queen Victoria on March 29, 1867, creating the united provinces under the Dominion of Canada, was to take effect on July 1 of that year.

89. The Fathers of Confederation wanted a strong, comprehensive economic union in addition to the political union it envisaged. The 1860s were the high-water mark in the belief in free enterprise, in the idea that government should allow the private sector to operate with minimal regulation from government. This belief arose as a result of certain events in the 1840s. At about that time, the protectionist movement in Great Britain was being replaced by a grass roots movement towards a free market approach to the economy. There was continuous debate

about the benefits of free trade in the British Empire during the period of time in question. By the 1850s, the debate had been conclusively settled. The consensus favoured free trade. The British concluded that by eliminating trade barriers both internally and externally, and by letting the market operate freely, maximized rates of economic growth would result. By the 1850s, both political parties in Great Britain shared this view. It was not a partisan issue as it had been previously. After 1850, most goods entering the United Kingdom did so without paying any customs duties. The British government replaced the revenue that had previously been collected from regressive customs duties with an income tax paid by the top two percent of British families. The concept of free trade became deeply entrenched in British political culture. In the 1860s, the quintessential British policy favoring free trade was recognized internationally. People associated Britain with free trade. Since the Fathers of Confederation were committed to remaining part of the British Empire, the British views on free trade would have been influential to them.

90. That was the historical context during which section 121 of the *British North America Act, 1867* came into being. Having examined this historical context, I come to the conclusion that section 121 was incorporated into the *British North America Act, 1867* as a result of apprehension by the Fathers of Confederation at the prospect of financial losses anticipated to arise from the repeal of the Reciprocity Treaty with the United States and from the concomitant anxiety generated by a significant loss of an established market for goods produced in British North America. The firmly established British movement towards free trade at the time of the constitutional discussions, together with the punitive losses brought about by the repeal of the Reciprocity Treaty would have had to have influenced the Fathers of Confederation to move in

the direction of free trade. I have been convinced that their intent was to replace the loss of the free trade American market with a free trade Canadian market. The strong and harmonious economic union envisaged by our Fathers of Confederation had to have been based on free trade, not on punishing internal non-tariff trade barriers, such as had been put in place by the Americans. The benefits to be realized by opening up the markets of each province to the products of the others would have been curtailed by allowing non-tariff barriers to be imposed by each of them.

THE PRONOUNCEMENTS BY THE FATHERS OF CONFEDERATION

91. What was said by the Fathers of Confederation and British parliamentarians during the events leading up to March 1867 has also assisted this Court in determining what was intended to be accomplished by them.

92. In the *Confederation Debates* on September 12, 1864, George Brown, a Father of Confederation, stated that he heartily endorsed Confederation because it would break down trade barriers and open up a new market. I quote:

> **"…Union of all Provinces would break down all trade barriers between us, and throw open at once…a combined market of four millions of people. You in the east would send us your fish and your coals and your West India produce, while we would send you in return the flour and the grain and the meats you now buy in Boston and New York. Our merchants and manufacturers would have a new field before them – the barrister in the smallest provinces would have the judicial honors of all of them before him to stimulate his ambition – a patentee could secure his right over all British America – and in short all the advantages of free intercourse which has done so much for the United States, would at once be open to us all".**

93. In Ottawa, on November 1, 1864, Alexander Galt, another Father of Confederation, said the following:

> **"Now we desire to bring about that same free trade in our own colonies. It is almost a disgrace to us, if I may use the term, that under the British flag, in the dominions of our Sovereign in British North America, there should be no less than five or six tariffs and systems of taxation; and we cannot have trade between one Province and another without being subjected to all the inconveniences which occur in a foreign country. Surely it is our business to remove these difficulties, and we ought as subjects of the Crown, whose interests are identical, to be united".**

94. On November 23, 1864, in Sherbrooke, Québec, Galt explained the rationale for Confederation by stating that one of "…the chief benefits expected to flow from the Confederation was the free interchange of the products of the labor of each province". He said Confederation would eliminate "restrictions on the free interchange of commodities as to prevent the manufactures of the rest from finding a market in any one province, and thus from sharing in the advantages of the extended Union".

95. John A. M^{ac}Donald, to be elected the first Prime Minister of Canada, in a speech on February 6, 1865, said:

> **"…if we wish... to establish a commercial union, with unrestricted free trade, between people of the five provinces, belonging, as they do, to the same nation, obeying the Same Sovereign…this can only be obtained by a union of some kind between the scattered and weak boundaries composing the British North American Provinces".**

96. Again, on February 7, 1865, in a speech in the Parliament of the Province of Canada on the desirability of Confederation, Galt referred to the prosperity North American colonies

enjoyed under the 1854 Reciprocity Treaty to demonstrate "the benefits of free commercial intercourse". He stated that trade had increased between British North America and the United States, stating it "swelled from less than $2,000,000.00 to upwards of 20,000,000.00 per annum". He observed that "we are threatened with an interruption of that trade" because United States' politicians would soon prove "hostile to the continuance of free commercial relations with this country". Since the United States were soon to re-impose trade barriers he said "…it is the duty of the House to provide, if possible, other outlets for our productions… If we have reason to fear that one door is about to be closed to our trade, it is the duty of the House to endeavour to open another". He stated this could be accomplished by providing for "free trade with our own fellow-colonists for a continued and uninterrupted commerce which will not be liable to be disturbed at the capricious will of any foreign country". He stated:

> **"I believe the Union of these Provinces must cause a most important change in their trade. Union is free trade among ourselves. Perhaps insurmountable difficulties may prevent us carrying out any such thing whilst separated, but when united our intercourse must be as free as between Lancashire and Yorkshire. The free intercourse between the States of the American Union – free trade in the interchange of products, has had more to do with their marvellous progress than anything that was put in their constitution. Give us Union and the East shall have free trade with the West".**

97. George-Étienne Cartier, another Father of Confederation, argued in favour of Confederation on the grounds that it would ensure free trade between the North American colonies. On February 7, 1865, he stated:

> **"It was of no use whatsoever that New Brunswick, Nova Scotia and Newfoundland should have their several custom houses against our trade, or that we should have custom houses against the trade of those provinces".**

98. On February 19, 1867, Lord Carnarvon said the following in the House of Lords:

> **"Now these districts, which it may almost be said that nature designed as one, men have divided into many by artificial lines of separation. The Maritime Provinces need the agricultural products and the manufacturing skill of Canada, and Canada needs harbours on the coast and a connection with the sea. That connection, indeed, she has, during the summer, by one of the noblest highways that a nation could desire, the broad stream of the St. Lawrence; but in winter henceforth she will have it by the intercolonial railway. At present there is but a scanty interchange of the manufacturing, mining, and agricultural resources of these several Provinces. They stand to each other almost in the relation of foreign States. Hostile Custom Houses guard the frontiers, and adverse tariffs choke up the channels of intercolonial trade. There is no uniformity of banking, no common system of weights and measures, no identity of postal arrangements. The very currencies differ. … Such then being the case, I can hardly understand that any one should seriously dispute the advantage of consolidating these different resources, and interests, and incidents of government under one common and manageable system".**

99. Lord Carnarvon therefore referenced both tariff and non-tariff barriers to trade in the British colony in his speech to the House of Lords.

100. On February 28, 1867, during second reading debate in the House of Commons in Great Britain, the Under-Secretary of State for the colonies, Mr. Charles Adderley, spoke the following in regards to the proposed *British North America Act, 1867:*

> **"The commercial advantages are, perhaps, the most prominent, and the least open to question or dispute. The idea is absurd of retaining a system of different commercial tariffs amongst these contiguous Provinces which are ruining and keeping down their trade. Why, the effect of the reciprocity treaty between the United States and Canada was to develop the commerce between these countries in one year from 2,000,000 to 20,000,000 dollars. That treaty has now ceased; but surely that is a reason why, at least amongst themselves, there should be the most perfect reciprocity. Well, then, as to**

> **their mutual interests, who can doubt that these three Provinces – the wheat-growing West, the manufactures Centre, and the fisheries and outlet on the coasts, are necessary to each other to make one great country jointly developing diverse interests. Was there ever, let me ask, a country so composed by nature to form a great and united community? By their mutual resources – by the assistance of their different interests, they would make together a powerful and prosperous nation. As long as they remain separate they are a prey to the commercial policy of other nations, and mutual jealousies among themselves".**

101. There were of course many debates and speeches leading up to Confederation. Only a small portion of them have been referred to by me. I believe however that the excerpts quoted demonstrate one of the principal motivations giving rise to the Canadian Confederation. The colonies of British North America had lost, or were about to lose, access to the free trade they had enjoyed for years with the United States. The existing systems in the Provinces were hampering free trade as between them and something needed to be done to open up the movement of goods as between the provinces to replace the loss of that American market. They had in place "customs houses" impeding trade. In my opinion, the Fathers of Confederation wanted free trade as between their respective jurisdictions. They also wanted to eliminate customs duties as between the provinces in order to open up the market for the movement of their goods. I conclude that to the Fathers of Confederation, the Union meant free trade, the breaking down of all trade barriers as between the provinces forming part of the proposed Dominion of Canada. The free movement of goods across provincial borders was, in fact, one of the major advantages the Fathers saw in Confederation.

THE JURISPRUDENCE ON SECTION 121

102. Of singular importance to the determination of these matters is the precedent set by the Supreme Court of Canada in the *Gold Seal* case. The facts leading up to the release of that judgment are important, as the defence alleges impropriety by certain of its participants. They also allege it was wrongly decided.

103. The Gold Seal Company, a liquor merchant in Calgary, Alberta, carried on an interprovincial business throughout Canada as an importer, an exporter and a distributor of all kinds of wines, spirits and malt liquors. On February 1, 1921, Gold Seal tendered to the Dominion Express Company packages of intoxicating liquors to be shipped to a person's private dwelling outside of Alberta. Dominion Express refused. They stated that they would not carry their intoxicating liquors from Alberta to any person or corporation in Saskatchewan or Manitoba. They did this because the Government of Canada had enacted the *Canada Temperance Amending Act*, which came into force in Alberta just a few days previously.

104. Without going into detail about the steps that legislation had to go through in order to take effect, the end result was that the federal cabinet had to issue a proclamation bringing the *Act* into force in Alberta, then it required that the proclamation "…name the day on which…[the] prohibition will go into force". The proclamation of the governor in council did not name the day on which the prohibition was to come into force. Gold Seal thereupon argued that the *Canada Temperance Amending Act* was not properly proclaimed.

105. The issue before the Supreme Court of Canada was whether or not the federal cabinet's proclamation of the *Act* had complied with the requirements of section 152(g) of the *Canada Temperance Amending Act*. Factums filed by both Gold Seal and the Attorney General addressed that issue. Their factums did not address section 121 of the *British North America Act, 1867*. Oral argument in the Supreme Court took place on May 10 and 11, 1921. During oral argument, Gold Seal must have raised the section 121 issue. The Court reserved its decision. On June 4, 1921, prior to the Supreme Court issuing judgment in the case, the federal government enacted the *Proclamation Validation Act*, S.C. 1921 (11 & 12 Geo. V) c. 20. Sections 1 and 2 of that *Act* declared as follows:

> 1. **No proclamation heretofore or hereafter issued under Part IV of the Canada Temperance Act, as enacted by chapter eight of the Statutes of 1919, second session, shall be deemed to be void, irregular, defective or insufficient for the purpose intended merely because it does not set out the day on which, in the event of the vote being in favour of the prohibition, such prohibition shall go into force, provided it does state that such prohibition shall go into force on such day and date as shall by order in council under section 109 of the Canada Temperance Act be declared.**
>
> **2. No order of the Governor in Council declaring prohibitions in force in any province, whether heretofore passed or hereafter to be passed, shall be or shall be deemed to have been ineffective, inoperative, or insufficient to bring prohibition into force at the time thereby declared by reason of any error, defect, or omission in the proclamation or other proceedings preliminary to the vote of the electors, or in the taking, polling, counting or in the return of the vote or in any step or proceeding precedent to the said order, unless it appear to the court or judge before whom the prohibition is in question that the result of the vote was thereby materially affected.**

106. The Supreme Court then allowed the parties to the proceedings to file supplementary briefs. The written judgment was released on October 18, 1921. It was held that the *Proclamation Validation Act*, making no exception from its application to proceedings in any suit pending at the time of its passage, was valid legislation and cured what would have been held to be a fatal defect in the proclamation. The proclamation having been "cured", the validity of the proceedings was upheld. An otherwise invalid proclamation was thereby saved by the *Proclamation Validation Act*.

107. As to section 121 of the *British North America Act, 1867*, the comments by Duff, Mignault, and Anglin JJ., have been subsequently interpreted to ring the death knell to what the defence alleges is a constitutionally protected right to interprovincial free trade.

Duff J. said at page 456:

> **"The capacity of the Parliament of Canada to enact the amendment of 1919 is denied. With this I do not agree. And, first, I am unable to accept the contention founded upon section 121 of the B.N.A. Act; the phraseology adopted, when the context is considered in which this section is found, shews, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting inter-provincial trade in the products of any province of the Union."**

Anglin J. said, at page 466:

> **"Neither is the legislation under consideration in my opinion obnoxious to s. 121 of the B.N.A. Act. The purpose of that section is to ensure that articles of the growth, produce or manufacture of any province shall not be subjected to any customs duty when carried into any other province. Prohibition of import in aid of temperance legislation is not within the purview of the section."**

Migneault J. stated at pages 469-470:

> **"Nor do I think that any argument can be based on sec. 121 of the British North America Act which states that all articles of the growth, produce or manufacture of any of the provinces shall, from and after the Union, be admitted free in each of the other provinces.**
>
> **This section, which so far as I know has never been judicially construed, is in Part VIII of the Act, bearing the heading "Revenues, Debts, Assets, Taxation," and is followed by two sections which deal with customs and excise laws and custom duties.**
>
> **In the United States constitution, to which reference may be made for purposes of comparison, there is a somewhat similar provision (art. 1, Sec. 9 par. 5 and 6) the language of which, however, is much clearer than that of sec. 121. It says:**
>
> **No tax or duty shall be laid on articles exported from any state. No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties to another.**
>
> **I think that, like the enactment I have just quoted, the object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say without any tax or duty imposed as a condition of their admission. The essential word here is "free" and what is prohibited is the levying of custom duties or other charges of a like nature in matters of interprovincial trade".**

108. The next case to deal with section 121 of the *British North America Act, 1867* was issued from the Judicial Committee of the Privy Council on appeal from the Supreme Court of Canada in *Atlantic Smoke Shops Limited v. Conlon* [1943] 4 D.L.R. 81 (referred to as *Atlantic Smoke Shops*), a case emanating from New Brunswick. The question in that case was the constitutionality of "An act to provide for imposing a tax on the consumption of tobacco" (the

Tobacco Tax Act), proclaimed by the legislature of the Province of New Brunswick in 1940. The retail operator of a store in Saint John, New Brunswick, who sold tobacco products argued that the provisions of the *Tobacco Tax Act* were ultra vires of the legislature of the Province of New Brunswick. Section 5 of that *Act* required of the resident the payment of the tax on tobacco brought in for their personal consumption from other provinces. The Court said the following relative to section 121 in paragraph 9:

> **"…Sect. 121 was the subject of full and careful exposition by the Supreme Court of Canada in Gold Seal, Ld. v. Attorney General for Alberta, (1921), 62 S.C.R. (Can.) 424, 439, where the question arose whether the parliament of Canada could validly prohibit the importation of intoxicating liquor into those provinces where its sale for beverage purposes was forbidden by provincial law. The meaning of s. 121 cannot vary according as it is applied to dominion or to provincial legislation, and their Lordships agree with the interpretation put on the section in the Gold Seal case, (1921), 62 S.C.R. (Can.) 424, 439. Duff J. held that "the phraseology adopted, when the contest *(sic)* is, considered in which the section is found, shows, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting inter-provincial trade in the products of any province of the union", Ibid. 456. (A.C.), Anglin J. said: "The purpose of that section is to insure that articles of the growth, produce or manufacture of any province shall not be subjected to any customs duty when carried into any other province", (1921), 62 S.C.R. (Can.) 466. Mignault J. described the purpose of the section as being to secure that admission of the articles described should be "without any tax or duty imposed as a condition of their admission", Ibid. 470, (A.C.). These considerations make it clear that if s. 5 of the Tobacco Tax Act is not obnoxious to s. 122 of the British North America Act, it is also free from objection on the score of s. 121. That the tax is taxation within the province is, their Lordships think, clear for the reasons given by Taschereau J".**

109. The reasoning behind the conclusion is found in paragraph 8 of the decision:

> **8 "Objection is taken to the validity of s. 5 on the alleged ground that it offends against ss. 121 and 122 of the British**

> **North America Act. When the scheme of Canadian federation is considered as a whole, the purpose and effect of these two sections seem plain enough. Previous to the date of federation, each province was a separate unit raising part of its revenue by customs duties on certain commodities imported from outside - it might even be from another province. One essential purpose of federating such units is that they should cease to maintain customs barriers against the produce of one another, and hence s. 121, supplemented by s. 123, established internal free trade from July 1, 1867, which was the date proclaimed for the Union. It was not, however, practicable to abolish provincial customs entirely on that date. Ordinary customs and excise are, as Mill's treatise shows, the classical examples of indirect taxation, and thus fell thenceforward within the exclusive legislative competence of the dominion parliament. But until the Dominion had imposed and collected sufficient taxes on its own account, it was desirable to continue to gather in the revenue arising from the customs and excise laws of the provinces (with the exception of inter-provincial import duties), though it would appear from s. 102 of the British North America Act that after federation the proceeds passed into the consolidated revenue fund of the Dominion. A dominion tariff has long since been enacted and the customs and excise laws of the different provinces have been brought to an end by dominion legislation. The question, therefore, on this part of the case, which has to be determined is whether s. 5 of the New Brunswick Act is invalid as amounting to an attempt by the province to tax in disregard of the restrictions contained in ss. 121 and 122 of the constitution. If s. 5 purports to impose a duty of customs, it is wholly invalid, and, if it denies free admission of tobacco into New Brunswick, it is invalid so far as this refers to tobacco manufactured in another province of Canada. Their Lordships have reached the conclusion that s. 5 does not impose a customs duty…"**

110. The next case to deal with section 121 is *Murphy v. CPR* [1958] S.C.R. 626 (referred to as *Murphy*). That case involved one Stephen Francis Murphy who was the president of a company he incorporated in British Columbia called Mission Turkey Farms Ltd. His company raised turkeys in British Columbia. On September 29, 1954, Mr. Murphy tendered to the Canadian Pacific Railway Company in Winnipeg, Manitoba, one sack of wheat, one of oats and

one of barley, requesting that it transport them to his farm in Princeton, British Columbia. The grain had been grown in Manitoba. It was obviously a test case, intended to question the validity of certain legislation. CPR refused to accept the grain for transport. It alleged that it was prohibited from doing so by reason of the provisions of the federally enacted *Canadian Wheat Board Act*, and more specifically, section 32 of that *Act*. That section provided that no person other than the Canadian Wheat Board could transport or cause to be transported from one province to another, or export from Canada any grain owned by a person other than the Board. The Board was required to purchase all wheat, oats and barley produced in the three Prairie Provinces. Mr. Murphy alleged that the *Canadian Wheat Board Act* was ultra vires the Parliament of Canada and that a prohibition against farmers shipping wheat out of a province was unconstitutional because it violated section 121 of the *British North America Act, 1867*. He lost on both counts. The Court held that the *Canadian Wheat Board Act* was valid federal legislation as it was in relation to a section 91 power involving regulation of trade and commerce. Locke J., speaking on behalf of the majority, summarily dismissed the section 121 argument citing Justices Duff and Anglin in the *Gold Seal* case, as well as the *Atlantic Smoke Shops* case. Interestingly in that case, Justice Rand, concluding as he did "…I find in s. 121 no obstacle to the operation of the scheme in any of the features challenged" (at page 643), did appear to widen the scope of permissible interprovincial trade where he stated, at page 642:

> **"I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary".**

111. Justice Rand cautioned that it was not necessary for the courts to explore section 121 in detail in both the *Gold Seal* and the *Atlantic Smoke Shop* cases. The *Atlantic Smoke Shop* case dealt with infringement by way of a tax, whereas *Gold Seal* dealt with infringement by way of a prohibition in support of valid provincial law (see page 639). He concluded on the topic, at pages 642-43, as follows:

> **"Section 121 does not extend to each producer in a province an individual right to ship freely regardless of his place in that order. Its object, as the opening language indicates, is to prohibit restraints on the movement of products. With no restriction on that movement, a scheme concerned with internal relations of producers, which, while benefiting them, maintains a price level burdened with no other than production and marketing charges, does not clash with the section. If it were so, what, in these days has become a social and economic necessity, would be beyond the total legislative power of the country, creating a constitutional hiatus. As the provinces are incompetent to deal with such a matter, the two jurisdictions could not complement each other by co-operative action: nothing of that nature by a province directed toward its own inhabitants could impose trade restrictions on their purchases from or sales of goods to other provinces. It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself; and I find in s. 121 no obstacle to the operation of the scheme in any of the features challenged".**

112. The final case to deal with section 121 is *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 (referred to as the *APMA* case). In that case, the facts relating to the reference showed that an agreement had been entered into between the federal Minister of Agriculture and federal marketing agency and their provincial counterparts in all the provinces. By this agreement, the parties contracted to establish a comprehensive egg marketing scheme under the *Farm Products Marketing Agencies Act*, 1970-71-72 (Can.), c. 65. The program involved federal and provincial marketing plans establishing quotas for export, interprovincial and intraprovincial

trade. The Canadian Egg Marketing Agency was established and set overall quotas for each Province. The Agency was given authority to impose levies or charges on the marketing of eggs by egg producers and these were to be collected on behalf of the Agency by the local egg board. In Ontario, the Ontario Farm Products Marketing Board set individual production quotas based on the Province's quota.

113. Thirteen questions relating variously to the validity of certain provisions of three *Acts*, two federal and one provincial, establishing an interlocking scheme of control of egg marketing, both as to price and supply, established under federal and provincial authority had been referred to the Ontario Court of Appeal. Interestingly, in none of the thirteen questions was reference specifically made to section 121 of the *Constitution Act, 1982*, although the question was raised as to whether enabling legislation was ultra vires the individual jurisdictions.

114. The following excerpts from Chief Justice Laskin's decision from that case deal with section 121. I should add that the arguments made by the appellants was that the enabling statute, by authorizing the Canadian Egg Marketing Agency to limit and control which egg producers may market interprovincially, the number of eggs they may market and the price at which they may sell effectively prevented the establishment of a single economic unit in Canada with absolute freedom of trade between its constituent parts, which they claimed was one of the main purposes of Confederation and which was guaranteed by section 121 of the Constitution (see page 48).

At page 21:

> **"The distortion allegedly involved in the overall regulatory scheme is said by the appellants to impede the free flow of**

commodities but, apart from the effect of s. 121 of the British North America Act, that could be the effect of any federal regulatory scheme which had no interaction with provincial agencies and there is no constitutional infirmity in such a consequence".

At page 45:

"I should note here that a second ground of attack upon the foregoing provisions was that they violated s. 121 of the British North America Act, the so-called "free trade" provision, which states that "all articles of the growth, produce or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces".

At pages 48 and 49:

"I should add that the objection to the anti-dumping provision is that because it precludes the marketing in one Province of eggs produced in another at a price less than the aggregate of the price in the Province of production and reasonable transportation charges, it imposes a tariff through inclusion of the cost of transportation in the price to be charged in the importing Province. The shipper is not allowed to absorb the cost of transportation even if he wishes, and the result, it is said, is that producers in one Province are protected as against producers in another.

The authorities on s. 121 were brought into the submissions to support the contentions that s. 121 applies to federal legislation no less than to provincial legislation and that the marketing plan here exhibits a protectionist policy as among Provinces, impeding the flow of trade in eggs between and among Provinces. Reference was made to the observation of Viscount Simon in Atlantic Smoke Shops v. Colon [[1943] A.C. 550.], at p. 569 that "the meaning of s. 121 cannot vary according as it is applied to dominion or to provincial legislation". It seems to me, however, that the application of s. 121 may be different according to whether it is provincial or federal legislation that is involved because what may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute. It must be remembered too that the federal trade and commerce power also operates as a brake on provincial legislation which may

seek to protect its producers or manufacturers gains entry of goods from other Provinces.

A federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade cannot, in my opinion, be in violation of s. 121. In Gold Seal Ltd. v. Dominion Express Co. [(1921), 62 S.C.R. 424.], both Anglin and Mignault JJ. viewed s. 121 as prohibiting the levying of customs duties or like charges when goods are carried from one Province into another. Rand J. took a broader view of s. 121 in Murphy v. C.P.R. [[1958] S.C.R. 626.], where he said this, at p. 642:

I take s. 121 apart from customs duties to be aimed against trade regulation which is designed to place fetters upon, or raise impediments to, or otherwise restrict or limit, the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation, I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as indicants of trade. What is forbidden is a trade regulation, that in its essence and purpose is related to a provincial boundary.

Accepting this view of s. 121, I find nothing in the marketing scheme here that, as a trade regulation, is in its essence and purpose related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any Province".

A RECONSIDERATION OF THE *GOLD SEAL* CASE

115. The defence is asking this Court to reconsider the *Gold Seal* case. They allege that the Supreme Court of Canada's interpretation that section 121 of the *British North America Act, 1867* prohibited only the establishment of customs duties affecting interprovincial trade was wrongly decided. They base this opinion on five arguments:

1. The Supreme Court of Canada did not interpret the *British North America Act, 1867* properly. They did not interpret it in a large, liberal and comprehensive spirit, as was required, considering the magnitude of the subjects with which it purports to deal in so few words.

2. The justices cited no authority, basing their conclusion on the "objects of the clause", notwithstanding there is nothing in the Confederation documents to suggest that the object of section 121 should be so limited.

3. No constitutional law textbook prior to the *Gold Seal* case suggested their restrictive interpretation of section 121.

4. The *Gold Seal* interpretation ignores the fact that section 121 does not mention the words "duties", "charges" or "taxes", whereas sections 102, 103, 123 and 126 do. Since the Fathers of Confederation knew the impact of duties, charges and taxes on goods, and had them included in other provisions of Part VIII, but not in section 121 in that Part, that

would suggest that they did not intend section 121 to be confined to prohibiting tariff barriers, but rather to be applicable to both tariff and non-tariff trade barriers.

5. Had the federal government not enacted the *Proclamation Validation Act* prior to the decision being released, Gold Seal would have won their case. The Supreme Court of Canada dismissed the section 121 argument summarily, which, by itself, is sufficient reason to reject its interpretation.

116. I cannot disagree with any of these remarks. The Supreme Court of Canada did not embark on a large, liberal or progressive interpretation of the *Constitution Act, 1867* in *Gold Seal*. There was in fact little interpretation at all of section 121. They cited no authority, they based their conclusion on the "objects of the clause" without examining the objects of the clause in detail, they relied on no constitutional law textbook, the case does not refer to other sections in Part VIII of the *British North America Act, 1867* and the one paragraph included on section 121 by Justice Duff could be classified as a summary dismissal of an argument. That however does not mean that the case was wrongly decided. It does mean that the case should be re-examined if allowed.

THE VERTICAL STARE DECISIS ISSUE

117. The defence is asking this Court to not follow binding precedent.

118. The Supreme Court of Canada has authority to depart from its previous decisions and it has done so in the past. However, departing from previous decisions should only be done with caution and for compelling reasons: see *Binus v. The Queen* [1967] S.C.R. 594, per Cartwright J. The lower courts, however, are bound by the principle of stare decisis, otherwise known as the doctrine of binding precedent, under which decisions of a court are binding on courts lower in the hierarchy.

119. There are exceptions to the stare decisis principle. These were recently explained in *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331 at paragraph 44 as follows:

> **44 "The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para. 42)".**

120. Chief Justice M^{c}Lachlin of the Supreme Court of Canada wrote the following in relation to the principle of stare decisis in the case cited, *Canada (Attorney General) v. Bedford* [2013] S.C.C. 72 (the *Bedford* case) in paragraphs 38 to 44:

> **38 "Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies.**
>
> **39 The issue of when, if ever, such precedents may be departed from takes two forms. The first "vertical" question is when, if ever, a lower court may depart from a precedent established by a higher court. The second "horizontal" question is when a court such as the Supreme Court of Canada may depart from its own precedents.**

40 In this case, the precedent in question is the Supreme Court of Canada's 1990 advisory opinion in the *Prostitution Reference*, which upheld the constitutionality of the prohibitions on bawdy-houses and communicating -- two of the three provisions challenged in this case. The questions in that case were whether the laws infringed s. 7 or s. 2(*b*) of the *Charter*, and, if so, whether the limit was justified under s. 1. The Court concluded that neither of the impugned laws were inconsistent with s. 7, and that although the communicating law infringed s. 2(*b*), it was a justifiable limit under s. 1 of the *Charter*. While reference opinions may not be legally binding, in practice they have been followed (G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960), 6 McGill L.J. 168, at p. 175).

41 The application judge in this case held that she could revisit those conclusions because: the legal issues under s. 7 were different, in light of the evolution of the law in that area; the evidentiary record was richer and provided research not available in 1990; the social, political and economic assumptions underlying the *Prostitution Reference* no longer applied; and the type of expression at issue in that case (commercial expression) differed from the expression at issue in this case (expression promoting safety). The Court of Appeal disagreed with respect to the s. 2(*b*) issue, holding that a trial judge asked to depart from a precedent on the basis of new evidence, or new social, political or economic assumptions, may make findings of fact for consideration by the higher courts, but cannot apply them to arrive at a different conclusion from the previous precedent (at para. 76).

42 In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

43 The intervener, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]",

> **creating a record and findings without conducting a legal analysis (I.F., at para. 25).**
>
> **44 I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.**

121. Professor Hogg in Constitutional Law of Canada, 5th Edition at page 8-24 posits the theory that, in constitutional cases, it is arguable that "the Court should be more willing to overrule prior decisions than in other kinds of cases", citing the dictum of Black J. of the Supreme Court of the United States in *Green v. U.S.* [1958] 356 U.S. 165, 195 who wrote the following:

> **"…the Court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents; otherwise its mistakes in interpreting the Constitution are extremely difficult to alleviate and needlessly so".**

122. In this case, I am no doubt bound by the vertical stare decisis principle which obliges me to follow the binding precedent set by the Supreme Court of Canada. I cannot ignore binding precedent unless one of the exceptions applies. The threshold is high. That threshold is met when "a new legal issue is raised, or if there is a significant change in the circumstances or evidence" (*Bedford* case, supra).

123. In this case, I do not believe that a new legal issue has been raised. The issue was addressed as far back as 1921 in the *Gold Seal* case. The Court there addressed the issue of what meaning was to be attributed to the word "free" found in section 121 of the *Constitution Act, 1867*. The members of the Court very summarily examined the phraseology adopted, the purpose of the section, its object and the context in which the section was to be found and arrived at its conclusion. It must be remembered also that three other Supreme Court pronouncements have been made relative to section 121: the *Atlantic Smoke Shops* case in 1943, the *Murphy* case in 1958 and the *APMA* case in 1978. All of these addressed in varying degrees of detail the legal issue that has been raised in this case.

124. Nor do I believe that there has been a significant change in circumstances justifying a departure from binding precedent. Whatever is meant by that expression, I would think that it would operate against the request made here by the defence. Canada, the provinces and its territories have carried on their economic policies in reliance on the binding precedent set by *Gold Seal* for over 95 years now. There has been no significant change in circumstances requiring reassessment.

125. What has occurred is that there has been a significant change in evidence, one that I believe has fundamentally shifted the parameters of the debate. To my knowledge, in none of the cases dealing with section 121 has there been any evidence presented to the trier of fact, or to the appellate court, addressing the issues presented before me respecting the following topics: the drafting of the *British North America Act, 1867*, the legislative history of the *Act*, the scheme of the *Act* and its legislative context. It has been the presentation of evidence on these issues that

changed in a substantial way the parameters of the debate on the correct interpretation of the expression “admitted free” in section 121 of the *Constitution Act, 1867*. In my opinion, this allows this Court to proceed with its analysis and indeed mandates that it do so.

THE DUFF LETTER

126. The defence calls into play the validity of the *Gold Seal* decision based on the improper manipulation of one of the foundational aspects of judicial independence. They allege that there was the exercise of extraneous influence in the judicial function at the highest court, which affected the outcome of the case. In support of this shocking allegation, they submit what is called the Duff letter.

127. The Duff letter was admitted by consent as Exhibit D-1, a certified true copy of a document filed in the Library and Archives, Canada, described by Nicole Fleury on behalf of the Librarian and Archivist of Canada as follows: “It is an unsigned letter from Lyman Poore Duff to Lord Haldane in 1925”. The letter is dated 4th of June, 1924, and addressed to the Rt. Hon. Viscount Haldane, O.M., K.T., House of Lords, London.

128. The paragraph from this letter, which purports to support the defence theory, is here reproduced:

> **“An instance of what I am referring to occurred a couple of years ago, in Meighen’s time when Doherty was Minister of Justice. A question was before this Court as to the validity of a proclamation to bring the Canada Temperance Act into force in Alberta. The temperance people were making a row about it, and the Minister of Justice, being anxious to ascertain the probable result of the appeal then pending, sent for two**

> **members of the Court, Anglin and Mignault, and obtained from them information as to their own opinions and the opinions of their colleagues and the probable result of the appeal, and as a consequence legislation curing the defect was introduced before our judgment was delivered. Doherty felt safe in that case, because he and the two judges mentioned were educated at the same Jesuit college in Montreal, with, as you may imagine, very close reciprocal affiliations".**

129. The reference to "Meighen" is likely a reference to then Prime Minister Arthur Meighen. The reference to "Doherty" was likely a reference to The Right Honourable Charles J. Doherty, the then Minister of Justice. "Anglin" and "Mignault" refer to two of Justice Duff's colleagues on the bench. Francis Alexander Anglin, a New Brunswicker, was appointed to the Supreme Court of Canada on February 23, 1909, and retired as Chief Justice of that Court on February 28, 1933. He served on the Supreme Court for 24 years. Pierre-Basile Mignault was an educator and the author of the monumental treatise Le Droit civil canadien, (9 volumes, 1885-1916). On October 25, 1918, he was appointed to the Supreme Court of Canada. He served on the Court for ten years, retiring on September 30, 1929.

130. It is therefore alleged that the two afore-mentioned justices from the Supreme Court of Canada met with the then Minister of Justice between May 11, 1921, (the final day of oral arguments in the Supreme Court of Canada) and June 4, 1921, (the proclamation date of the *Proclamation Validation Act* in Parliament). It is further alleged that the three not only discussed the possible outcome of the *Gold Seal* case, but further that Justices Anglin and Mignault disclosed to the Justice Minister how they were to decide the case. It is implied that they also told him, explicitly or implicitly, how to change the outcome of the case.

131. The question is what import should this letter have on my decision in this case?

132. Defence counsel referred to *Canada v. Tobiass* [1997] 3 S.C.R. 391 to explain the seriousness of such allegations and the possible ramifications. In that case, Mr. Thompson, the Assistant Deputy Attorney General in charge of civil litigation at the federal Department of Justice, met in private with the Chief Justice of the Federal Court. The two men discussed the scheduling of the Minister of Citizenship and Immigration's cases in the Federal Court. They later exchanged letters, neither of which was copied to any of the counsel for the other parties. In his letter to the Chief Justice, Mr. Thompson referred to the fact that the Attorney General was being asked to consider taking a reference to the Supreme Court of Canada to determine some preliminary points of law because the Trial Division was unable or unwilling to proceed with the cases expeditiously. In his reply, the Chief Justice stated that he had discussed Mr. Thompson's concerns with the Associate Chief Justice, and that both were prepared to take all reasonable steps to avoid such a reference. He added that the Associate Chief Justice said he had not fully appreciated "the urgency of dealing with these matters as expeditiously as the Government would like" until he had read his letter. However, now that he was aware of the Government's concerns he would devote one week to deal with the cases not only with respect to the preliminary points but also with respect to the merits. A judicial stay of proceedings was sought by the applicants. The Supreme Court of Canada dealt with the impropriety in this way. I quote paragraph 85 of the decision:

> **85 "In short, the evidence supports the conclusion that the appearance of judicial independence suffered a serious affront as a result of the…meeting between Mr. Thompson and Isaac C.J. This affront very seriously compromised the appearance of judicial independence. A reasonable observer apprised of the workings of the Federal Court and of all the circumstances**

> **would perceive that the Chief Justice and the Associate Chief Justice were improperly and unduly influenced by a senior officer of the Department of Justice. However, there is no persuasive evidence of bad faith on the part of any of the actors in this drama, nor is there any solid evidence that the independence of the judges in question was actually compromised.**

Notwithstanding the finding of impropriety, the Supreme Court refused to stay proceedings.

133. Certainly no one would doubt that a clandestine meeting to discuss the possible outcome of pending litigation between a party to that case and two justices who have heard and have reserved their decision on it would be highly improper. Such a situation would compromise the appearance of judicial independence. It would be unheard of today and must have been unheard of in 1921. It would constitute unethical and unprincipled behaviour for any judge to tell a litigant in a case actually before the courts what the possible outcome of that case will or could be.

134. The difficulty I have is actually deciding that this discussion occurred. There was very little evidence presented before me on this topic, important though it may be to the defence's position here. The only evidence about the holding of this discussion with the Minister of Justice is that which is contained within the actual letter D-1. There was no other documentary or other evidence proffered in support of the allegations contained within it. In other words, the allegations must stand or fall entirely on the contents of D-1 since no other evidence was presented to otherwise shore up proof of the alleged misconduct. Articles may have been published exposing it and biographers and historians may have written about it, but, for the purposes of this trial, no other supporting evidence exists in relation to it.

135. To be precise, at this trial, I have heard no evidence from any source that would shed any light on the discussions held during that meeting. I have nothing emanating from Lord Haldane proving that he received the letter or responded to it. I have nothing emanating from Justices Anglin or Mignault confirming the meeting took place or what may have been discussed. I have nothing emanating from then Minister of Justice the Right Honourable Charles Doherty, or from his office. In summary, no confirmatory evidence about the holding of the meeting or the discussions that may have occurred there was presented to me.

136. As to the letter itself, I feel I must be cautious about the weight I should attach to it. I state this for a number of reasons which I will now expose.

137. I have no evidence that the letter was actually mailed to Lord Haldane. I am certain that Justice Duff wrote it, but nothing proves it was received. It would be as much impermissible speculation to conclude that it was mailed as to conclude that it wasn't.

138. The letter is unsigned. Furthermore, it does not follow the usual form of either a personal or a business letter. The first page contains the usual heading containing the date and place of issuance, being Ottawa. It then states: "Dear Lord Haldane:" Following the salutation, Justice Duff explains that the Court will not get through their list in time for a sailing on the 13th, as he originally expected, but that he will go on the Montclair on the 20th, arriving in London on the 27th. He then places his closing: "With kind regards, Yours sincerely", without a signature. At the bottom of page 1 is the addressee: "Rt. Hon. Viscount Haldane, O.M., K.T., House of Lords, LONDON". This appears to be a self-contained one-page letter, yet there follows six

additional pages on a variety of topics, none referenced on the first page. It almost appears like an attachment to the letter, or at least what one might today consider to be as such. The final paragraph of the letter appears to end abruptly, as if the writer hadn't finished the letter. There is no closing salutation or signature on the last page.

139. The very appearance of this letter is therefore unusual. It does not follow the usual form one would expect.

140. Next, and perhaps most importantly, the source of the information obtained by Mister Justice Duff is not identified. Justice Duff was obviously not at that meeting therefore the facts outlined in the paragraph constitute hearsay evidence. Justice Duff must have obtained that information from another source, but there has been no evidence presented at this trial to establish that the information he relates in the letter originated from a reliable or trustworthy source. Again, one might surmise that the information had to have come from either Justices Anglin or Mignault or the Minister himself, but there being no confirmation of this, it is impermissible speculation in my opinion. Justice Duff did not, for example, state in the letter: "Justice Anglin told me about a meeting he had with the Minister…" The fact is, there may have been others present at the meeting, or there may have been someone who overheard the conversation but who did not participate in the meeting. All of this is of course speculative, which must raise a cautionary flag in the mind of the trier of fact.

141. In addition, I must also question Mister Justice Duff's motivation for conveying the particular message. This was not the only allegation of impropriety surrounding judges. He made three other allegations in the letter implying improper conduct.

142. In the third paragraph of the letter he wrote:

> **"…Anglin, for example, shortly after his appointment to this Court, went to Detroit and made a bitter speech to a congress of Irish-American educationists, attacking the decision of the Privy Council in connection with the Manitoba school controversy in 1905, ascribing the decision to political influence".**

143. Mister Justice Duff therefore is alleging that the same Justice Anglin who he stated had an improper meeting with the Minister of Justice in the *Gold Seal* case, also discussed his belief that political influence was brought to bear in a decision of the Judicial Committee of the Privy Council.

144. In the fifth paragraph of the letter, Justice Duff wrote the following:

> **"The Prime Minister himself is very jealous, I think, of the authority of the courts to deal with <u>ultra vires</u> legislation, and I do not doubt that he would prefer to see the final authority in the Canadian courts, with the idea that a court in Ottawa would be amenable to influence. You can have very little idea of the liberties some Canadian Ministers will allow themselves in influencing judges where they think it is safe to bring pressure to bear…"**

145. Mister Justice Duff therefore also appears to be alleging improper conduct by the politicians towards the judges, allowing themselves to bring pressure on them when they think it would be safe to do so. He also appears to have expressed the belief that if the court of last

resort was the Supreme Court of Canada, this would please the Prime Minister of Canada as the Court would be amenable to influence by him or by his Ministers.

146. Finally, in the seventh paragraph, Mister Justice Duff wrote the following:

> **"…The Prime Minister, who was then Deputy Minister of Labour here, and his cousin, who up to that time had been a close personal friend of mine, made a direct attempt to influence the decision of the members of the Court by communicating facts which afterwards came out in another litigation and which undoubtedly did shew that Lesueur was rather unfairly taking advantage of material placed at his disposal by Mackenzie's descendants to raise questions as to Mackenzie's personal character which might much better have been left alone. The majority of this Court decided in favour of Lesueur and the offence was passed over without comment, unfortunately, as I thought at the time…"**

147. So it would appear that Mister Justice Duff considered that the then Minister of Labour, who later became Prime Minister, committed an "offence" by making a direct attempt to influence the members of the Supreme Court of Canada by communicating facts to them, which facts subsequently came out in another litigation.

148. I mention these three other allegations of misconduct in order to highlight the dangers of proceeding on unsubstantiated and possibly unreliable hearsay. One might question the bona fides of Justice Duff in view of the other comments he makes in the same letter.

149. It is true, as was pointed out by the defence, that the Minister of Justice knew there was another option open to him to avoid an unfavourable judgment in the *Gold Seal* case and this opens up the possibility that information came from Justices Anglin or Mignault. However I am

not prepared to conclude, based on the Duff letter alone, that Justices Anglin and Mignault, if they were present at a meeting with him, told him how they were going to decide the case and presented to him this option in order to avoid the adverse ruling. The Right Honourable Charles J. Doherty had been, after all, the Minister of Justice for a number of years, he taught International Law at McGill University and was a former Justice of the Superior Court of Québec. There is no doubt he would consequently have been quite capable of having come up with his own ideas about how to avoid any negative consequences arising from the pending judgment in *Gold Seal*.

THE NATURE OF THE CANADIAN CONSTITUTION

150. Dr. Thomas Bateman, Associate Professor and Chair of the Department of Political Science at St. Thomas University in Fredericton, New Brunswick, a political scientist, was qualified by the Court to give opinion evidence in Canadian constitutionalism (being the history and politics of the Canadian constitution), conventions of the Canadian Constitution (being unwritten judicially unenforceable rules that fill out the Canadian Constitution as part of our British inheritance), Canadian constitutional development from Confederation to the present and Canadian federalism as it has been influenced by both judicial interpretation and by intergovernmental relations. His written report was admitted into evidence by consent as Exhibit C-11. Admittedly, he had never published any articles on section 121 of the *Constitution Act, 1867*, nor of its historical or political context. He also admitted that he had never published any article regarding the "constitutional moment" between 1864 and 1867. He has, however,

commented on Supreme Court of Canada decisions which either directly or indirectly touch upon the issues raised by section 121.

151. Dr. Bateman wrote in his report that Section 92 of the *Constitution Act, 1867* sets out most of the provinces' policy responsibilities. In regard to alcohol specifically, the provinces have jurisdiction in respect to direct taxation, saloon and tavern licences for revenue purposes, the incorporation of companies with provincial objects, property and civil rights in the province, and generally all matters of a local or private nature in the province. This, he says, leads one to conclude that provinces have appreciable constitutional room to legislate in respect to the production, sale, regulation and consumption of alcohol. The federal government, on the other hand, has jurisdiction in, among other things, the regulation of trade and commerce, all forms of taxation and criminal law. It too can legislate in relation to certain aspects of alcoholic liquors. He wrote in his report that "Section 121, in principle, operates as a limit on federal and provincial legislative activity in areas within their competence. Neither courts nor politicians have been particularly assiduous in using s. 121 to limit governments' legislative activities". He was of the opinion that since provincial laws usually have either the purpose or effect of limiting free trade, any robust interpretation of section 121 would sharply clip the provinces' policy space.

152. Dr. Bateman listed examples of barriers which either intentionally or in effect obstructed internal free trade. These include:

- Differential tax rates and other tax policies, some of them fashioned to attract businesses from other jurisdictions;

- Differential professional accreditation and licencing standards;
- Differential product standards, labelling requirements, and grading schemes;
- Agricultural commodity supply management schemes that define quantities produced and prices paid for products;
- Various policies to encourage the development of provincial economic sectors, including natural resources;
- Provincial liquor policies encouraging the consumption of products produced from within the province; and
- Government procurement policies favouring domestic suppliers of goods and services though out-of-province bids may be superior on quality or price.

153. These barriers are the result of the operation of Canadian federalism, he states. In his opinion, the existing tension between the division of powers in sections 91 and 92 and the free trade provision in section 121 has been resolved by a weakening of section 121. He affirmed that Canadian governments, rather than the courts, have taken on the lion's share of responsibility for the management of the federation. Indeed, courts encourage political rather than judicial management of the federation. This is accomplished in part by the courts' recognition of constitutional conventions and by a judicious deferral to governments to maintain the balance of powers.

154. As I understand it, the Crown's position is that notwithstanding what may have been the intent of the framers of the Constitution, the Canadian Constitution is more than merely the

written text of the Constitution, a basic principle which has been recognized by the courts, and that federalism must evolve in order to "address and be responsive to the nature of the Canadian federation" (Post-trial Brief on Law, page 10). According to the prosecution, "federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction" (Post-trial Brief on Law, page 11).

155. Given the nature of the Canadian Constitution, the prosecution states that it may, and often does take both provincial and federal powers to competently and adequately legislate in particular spheres of activity, citing *Tsilqhot'n v. British Columbia* [2014] S.C.C. 44 at paragraph 148. As a result, conflicts in relation to the division of constitutional powers in Canada today are more often resolved than litigated, a fact which also underscores the depth of influence exerted by the unwritten Constitution in the evolution of the Canadian polity (Post-trial Brief on Law, page 9).

156. The prosecution asks this Court to not deconstruct the political and constitutional accommodation of federalism as it has taken shape in Canada since 1867. To quote the testimony of Dr. Bateman:

> **"…a very robust interpretation of section 121 would drain the section 92 power…of most of their significance because the … very existence of jurisdiction that provinces can exercise means that different provinces can exercise their jurisdiction in different ways and I would say that almost inevitably at least some, maybe many, maybe most exercises of different provinces' jurisdictional responsibilities would operate as some kind of barrier to free trade. So a very robust interpretation of section 121 would operate against the division of powers such as 91 and 92. My guess is that you can't have one provision of**

> **the Constitution interpreted in a way to obliterate another provision of the Constitution and to put the point slightly differently, the interpretation which seems to prevail at the moment, mainly that section 121 is really to do with the prohibition on customs and duties at a provincial border, is…a fairly workable way to reconcile internal free trade with the existence of powers by provinces under section 92" (transcript, vol. 4, page 96, lines 4 to page 97, line 2)**

157. In my opinion, this is a very compelling argument. A robust interpretation of section 121 would create conflict with the exercise of provincial powers under section 92 of the *Constitution Act, 1867*. Dr. Bateman gave the example of a province which, for purposes related to their internal needs, imposes restrictions on imports of any particular product from other provinces. This would be an impediment to free trade in that commodity. A robust interpretation of "admitted free" in section 121 would tear down those restrictions as being impediments to free trade, which weakens the ability of that province to protect its own interests.

158. The interpretation of section 121 sought by the defence amounts to a request to this Court to dismantle a regime that has been in place since the inception of the Constitution in 1867.

159. The prosecution requests of the Court simply to recognize and uphold the current state of affairs, one which has been steadfastly adhered to and which, for all intents and purposes, appears to have adequately regulated the affairs between all levels of government. The Crown argues that constitutional doctrine must facilitate, not undermine co-operative federalism - *Thisqhot'n* case, supra, at para 149.

160. There can be no question but that in the intervening years since *Gold Seal* has been decided, governments have put in place a multitude of restrictive measures across this country. These include marketing boards such as for wheat, eggs, milk and poultry, provincial liquor monopolies in all provinces, and a host of existing schemes that interfere with interprovincial trade. There are also innumerable policies put in place by the provinces that could be understood to limit free trade between the provinces, including those listed by Dr. Bateman. The *Gold Seal* interpretation has also "enabled the creation of federal schemes that have imposed interprovincial trade barriers in the form of mandatory sale requirements, prohibitions of interprovincial shipments, and imposition of provincial quotas", per Ian Blue, Q.C. Free Trade within Canada: Say Goodbye to Gold Seal, page 20.

161. The effect on section 92 of the *Constitution Act, 1867* of defining "admitted free" as requiring free trade among provinces without any trade barriers, tariff or non-tariff, whether found in federal or provincial legislation, such as advanced by the defence, would eliminate any scheme that would interfere with the free movement of goods inter-provincially, whether for agricultural products, produce, manufactured goods, liquor or any other product regardless of whether or not such regulated scheme was enacted for the benefit or the protection of the residents of that province. It would likely only allow for the regulation by the provinces of matters that would not interfere with inter-provincial movement of these goods. Justice Rand in the *Murphy* case called these "subsidiary features". How exactly this would play out would no doubt be the subject of much political maneuvering and court interpretations.

162. To put this matter in its proper context, this is obviously not a "division of powers" case, nor, I believe, one that requires an examination of the principles of "exhaustiveness", "interjurisdictional immunity" or "paramountcy" as suggested by the prosecution. This is not a case dealing with a conflict as between laws passed by two separate jurisdictions or of entrenchment by one jurisdiction over another's powers. But it does require the Court to consider the issues by reference to contemporary views of Canadian federalism, as explained by the Supreme Court of Canada in *Canadian Western Bank v. Alberta [2007] 2 S.C.R. 3 at para. 42:*

> **42 "…Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly".**

163. The intention of the framers of the Constitution in drafting legislation is obviously a very important factor to be taken into account, albeit not a decisive factor. This is borne out by the situation which developed in the case of *R. v. Blais* [2003] 2 S.C.R. 236 where counsel evidently invited the Supreme Court of Canada to interpret a constitutional document in a manner that was not consistent with the intention of its drafters. Mr. Blais was a Manitoba Métis. He was convicted of hunting deer out of season. He had been hunting for food on unoccupied Crown land. His defence was based solely on the allegation that, as a Métis, he was immune from conviction under the *Wildlife Act* regulations in so far as they infringed on his right to hunt for food under paragraph 13 of the Manitoba *Natural Resources Transfer Agreement* (the *NRTA*). The *NRTA* stipulated that the provincial laws respecting game applied to the Indians subject to the continuing right of the Indians to hunt, trap and fish for food on unoccupied Crown lands. The Manitoba *NRTA* is a constitutional document, incorporated as Schedule (1) to the

Constitution Act, 1930. The issue was whether the word “Indians” in paragraph 13 of the *NRTA* included the Métis. The Court proceeded with the interpretation of the constitutional document in this way:

> **16 Against this background, we turn to the issue before us: whether "Indians" in para. 13 of the *NRTA* include the Métis. The starting point in this endeavour is that a statute -- and this includes statutes of constitutional force -- must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As P.-A. Côté stated in the third edition of his treatise, "Any interpretation that divorces legal expression from the context of its enactment may produce absurd results" (*The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 290).**

164. The Court then addressed counsel’s request to interpret the constitutional document favourably to Mr. Blais notwithstanding what might have been the original intent of the document, at paragraphs 39 and 40 as follows:

> **39 “We decline the appellant's invitation to expand the historical purpose of paragraph 13 on the basis of the "living tree" doctrine enunciated by Lord Sankey L.C. with reference to the 1867 *British North America Act*: *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. The appellant, emphasizing the constitutional nature of paragraph 13, argues that this provision must be read broadly as providing solutions to future problems. He argues that, regardless of paragraph 13's original meaning, contemporary values, including the recognition of the Crown's fiduciary duty towards Aboriginal peoples and general principles of restitutive justice, require us to interpret the word "Indians" as including the Métis.**
>
> **40 This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. Constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of governmental power": *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, *per* Dickson J. (as he then was), at p. 155. But at the same time, this Court is not free to invent new obligations foreign to**

> **the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. As emphasized above, we must heed Dickson J.'s admonition "not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart, supra,* at p. 344; see Côté, *supra,* at p. 265. Dickson J. was speaking of the *Charter*, but his words apply equally to the task of interpreting the *NRTA*. Similarly, Binnie J. emphasized the need for attentiveness to context when he noted in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14, that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse." Again the statement, made with respect to the interpretation of a treaty, applies here".**

165. "The original purpose of the provision at issue" therefore, is an important consideration in approaching judicial interpretation of the Constitution. Courts should not allow such elemental and fundamental considerations to be displaced merely by notions of what, today, may amount to a request for accommodation based on a long-standing misinterpretation of the intent of the Fathers of Confederation.

IS A FINE A TARIFF

166. The defence has attempted to convince the Court that the imposition of a fine imposed by a provincial government for the commission of a regulatory offence, such as the one committed under section 134(b) of the *Liquor Control Act*, is a financial consequence of crossing a border and consequently is in the nature of a tariff trade barrier.

167. Whereas I agree that both are financial consequences of the act of crossing goods over a provincial border, I am not convinced that a fine is a tariff trade barrier. It would appear to me that a province has jurisdiction to impose fines for offences committed within their borders. The

fines are imposed for the purpose of inflicting punishment for the offence committed. It may also be considered as a means to dissuade or discourage the commission of the offence in the particular jurisdiction.

168. However, the nature of a tariff trade barrier and that of a fine are very different. They are of a different character. Whatever definition one might give to the expression "tariff trade barrier", it would not seem appropriate to me to include fines levied as punishment for the commission of an offence within its definition. In order for the fine to be imposed, an offence has to have been committed and the person would have to have been convicted of it. In my opinion, in this particular case, it is not the fine imposed that would constitute the trade barrier, but the prohibition from import imposed under section 134(b) of the *Liquor Control Act.*

THE ISSUE OF DESUETUDE

169. Dr. Bateman suggested in his testimony and in his report that section 121 of the *Constitution Act, 1867* has fallen into desuetude and its disuse may now be a constitutional convention. He maintains that only a portion of Canada's whole constitutional corpus is in the written Constitution and that a significant degree of our Constitution is unwritten. These he referred to as constitutional conventions, also called "rules of critical morality". These conventions bind political actors and can be as binding as any entrenched law. They give shape and substance to the skeletal written constitution. Not being in the constitutional documents, however, they are not enforced by the courts in the same way as the formal provisions are. Some conventions are so fundamental to the very nature of the Canadian constitutional order that they are considered binding upon actors to a high degree.

170. Dr. Bateman suggests that judicial interpretation of section 121 has fallen short of the expectations of those who seek a Canadian free trade area. Decisions such as the *Gold Seal* case confined the section to the invalidation of tariff-like interprovincial barriers at a time when these were the main impediments to free trade. Since then, as government intervention into the economy increased, and as non-tariff barriers proliferated, section 121 has fallen into a type of desuetude. He explains that governments do not use section 121 to challenge the protectionist policies of other governments. As such perhaps a convention has formed whereby section 121 is effectively rendered inoperative.

171. Dr. Bateman was of the opinion that section 121 refers only to customs duties at the provincial borders and since the interprovincial customs and duties were removed soon after Confederation, they are out of play. There being no tariffs at the border between provinces, section 121 is dormant and has become a convention such that no province would now contemplate imposing a custom duty at the border. He compared it to the section 56 power permitting the British government to disallow legislation passed by the Parliament of Canada, and the section 90 power allowing the Governor General of Canada on the advice of the Government of Canada to disallow a law passed by a provincial legislature. Both these sections have fallen into desuetude.

172. Having heard the evidence given by Dr. Bateman on the issue of whether section 121 has fallen into desuetude, I find that if by desuetude he means it is unused or rendered inoperative, then I would agree. I would not agree however that it has become inoperative for the reasons he

stated. Once the Supreme Court of Canada strictly interpreted section 121 to custom duties, there was in reality nowhere else for the section to go. It strictly prohibited custom duties and nothing else. Its disuse became merely a matter of practice or custom. It was not possible for the section to be interpreted in any way to come to the aid of any other governmental policy or strategy.

173. Dr. Bateman interpreted section 121 differently than did Dr. Smith. His interpretation focused on the addition of the words immediately preceding and following the word "free", that is, "admitted free into". In his opinion, "admitted…into" suggests a border crossing matter. Since customs are levied at a border, section 121 is confined to customs.

174. I am not convinced that the words "admitted…into" limit the expression "admitted free into" to custom duties only. Indeed, my interpretation of the words of section 121 has concluded otherwise, based on a number of factors. Certainly there is no reason to adopt the very strict interpretation put upon the wording as advanced by Dr. Bateman. Nothing in the words "admitted free into" could possibly lead to that interpretation.

SIGNIFICANT FINDINGS

175. I found it interesting that the RCMP in Campbellton were targeting people crossing the border with five cases of beer or more. The limit was twelve bottles and the RCMP knew this. This suggests a certain *laissez-faire* attitude by the police in relation to this particular offence provided their arbitrarily imposed limit to the amount traversing the border was not crossed. It

hardly makes sense that a person carrying five cases of beer would be charged but an individual with four cases would not, when in both scenarios the identical offence was committed. This, I suppose, is a reflection of the tolerance shown by public safety officials to this type of regularly-occurring offence which is not likely a high priority in terms of crime prevention.

176. The Maritime Beer Accord, the *Agreement on Internal Trade* and efforts by provincial jurisdictions to increase allotted import quotas for alcohol all represent to some extent, efforts to circumvent existing trade barriers. None of these schemes has been particularly successful, especially with respect to alcohol. The provinces, for the most part, assiduously protect their monopolistic hold on this important source of revenue.

177. With respect to the nomenclature of section 121 of the *Constitution Act, 1867*, I find that there is nothing in the language used in that section that could lead one to conclude it was intended to prohibit customs duties or charges.

178. I find that the changes made in the wording of section 121 of the *Constitution Act, 1867*, more specifically the changes between the first and second draft, was a reflection by the Fathers of Confederation of their forward-looking views of the proposed new country. They anticipated expansion and they anticipated greater trade as between the provinces, as demonstrated by the deletion of the reference to ports. The amended wording reflects their attempt to gain unfettered economic exchange and a more comprehensive economic union.

179. I find that drafter Francis Reilly used wording found in existing legislation in the British colonies in drafting section 121 of the *British North America Act, 1867.* The similarity in the wording could not have been happenstance or coincidence. The colonies of Nova Scotia, New Brunswick and the Province of Canada all had drafted legislation in their respective jurisdictions that eliminated trade barriers between them. The Province of Canada's *Act* was called *An Act to facilitate Reciprocate Free Trade between this Province and other British North American Provinces.* These laws were clearly intended to encourage trade as between the three then existing provinces. The words "the growth, production or manufacture of any such Province" in the New Brunswick *Act* mirrors the wording that was adopted for use in section 121 of the *British North America Act, 1867*, which compels me to conclude that the Fathers of Confederation wished to use wording in section 121 that was similar to the words used in existing legislation encouraging free trade in their respective provinces.

180. I find that the placement of section 121 in Part VIII of the *British North America Act, 1867,* does not assist the Court in arriving at any conclusion as to its meaning or its limitations. Attempting to find meaning in its placement is an exercise in futility. It was most likely placed in that part of the *Act* that was the most fitting considering all other parts of the *Act*.

181. I find that the British, at the time of the drafting of the *British North America Act, 1867* were very experienced in legislative drafting, including on commercial and economic matters. Being experts in diplomacy and trade negotiation, they would have known to include "from customs duties or charges" in section 121 if such were the wishes of the Fathers of

Confederation. During this time period, most goods entering the United Kingdom did so without paying customs duties.

182. I am convinced that the Fathers of Confederation were keenly aware of the distinction to be drawn between the expressions “admitted free” and “admitted free from duty”. I am also convinced that they deliberately avoided the “free of duty” terminology because that was not their wish. The best source for arriving at a conclusion about the intent of the Fathers of Confederation is provided by its historical context. In other words, the intention of the Fathers of Confederation is most pertinently demonstrated by the historical context during the constitutional moment leading up to the enactment of section 121.

183. That historical context leads to only one conclusion: the Fathers of Confederation wanted to implement free trade as between the provinces of the newly formed Canada. They specifically rejected an American-style of government and adopted continuity with the British system of government at a time when free trade was actively implemented in Britain. Economic development was not only pursued, it was one of the foundational reasons for the pursuit of a union. The repeal of the Reciprocity Treaty with the United States, which was based on free trade, necessitated the search for alternatives. The proposed discussions between Nova Scotia, Prince Edward Island and New Brunswick in September 1864 about possible political and economic union opened up the possibility to replace the American free market with a made in Canada free market for all provinces. The Fathers of Confederation wanted to replace the lost free trade with the United States with free trade as between the proposed provinces of Canada.

184. This constitutes a summary of the historical context leading up to the enactment of section 121. The free trade sought by the framers of our Constitution would not have been accomplished merely by the abolition of customs duties at provincial borders, even though that was one of the steps they took following the creation of the federation.

185. I find that the penalizing non-tariff barriers to trade imposed by the Americans in the years leading up to the repeal of the Reciprocity Treaty shows that the Fathers of Confederation were not simply concerned with eliminating customs duties as between the provinces. Rather, they wanted to avoid all such barriers, tariff or non-tariff. The barriers to trade as between the two countries were based on non-tariff schemes, not taxes or customs duties.

186. I find that the speeches and orations from the Fathers of Confederation prior to the enactment of the *British North America Act, 1867* conclusively point to their desire to implement free trade as opposed to the elimination of customs duties as between the provinces. Examples abound: "Union of all Provinces would break down all trade barriers between us"; "Now we desire to bring about that same free trade in our own colonies"; "…the free interchange of the products of the labor of each province"; "…if we wish to…establish a commercial union, with unrestricted free trade, between people of the five provinces…"; "Union is free trade among ourselves".

187. The current state of the law in Canada on the meaning and effect of section 121 of the *Constitution Act, 1867* is clear and unambiguous: section 121 prohibits the establishment of customs duties affecting inter-provincial trade in the products of any province in Canada. The

principle of vertical stare decisis mandates that I follow that law and not deviate from it unless an exception is warranted. I believe in this case that an exception has been established by the presentation, for the first time, of expert evidence on the historical context of section 121 of the *British North America Act, 1867*.

188. I believe that if the evidence that was presented before me at this trial had been brought to the attention of the justices of the Supreme Court of Canada in their deliberations on the meaning of section 121, particularly when the *Gold Seal* case was decided in 1921, the result would have been different.

189. It is therefore with a great deal of trepidation that I find that the *Gold Seal* case was wrongly decided, for the reasons outlined. I believe that the narrow and strict interpretation placed upon section 121 in the *Gold Seal* case was unwarranted and unfounded. Furthermore, the *Gold Seal* decision shaped all subsequent cases dealing with section 121. Should the Supreme Court of Canada agree that *Gold Seal* was wrongly decided, then undoubtedly they would re-examine all other cases dealing with section 121.

190. I find that in the case presented to me, the Duff letter has no relevance to the issued to be decided. There are too many unknown variables permitting me to arrive at any conclusion based on its contents alone. For reasons relating primarily to its reliability as evidence, I find that the Duff letter does not assist in arriving at any conclusion in this matter.

191. I am certain that interpreting section 121 of the *Constitution Act, 1867* as permitting the free movement of goods among the provinces without barriers, tariff or non-tariff will have a resounding impact. Indeed, the consequences of this finding could be significant. The path of least resistance would mandate that the Court simply follow the *Gold Seal* ruling and allow for the continuance of existing structures and schemes which have been in place for nearly a century. But statutes of constitutional force must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve; their analysis must be anchored in the historical context of the provision: *R. v. Blais*, supra.

192. I find that section 121 of the *Constitution Act, 1867* has not fallen into desuetude. Its disuse or neglect has arisen as a result of an unfounded judicial interpretation which effects have continued for nearly a century.

CONCLUSION

193. Section 134(b) of the *Liquor Control Act* of New Brunswick constitutes a trade barrier which violates section 121 of the *Constitution Act, 1867* and is therefore of no force or effect as against Gérard Comeau.

194. The charge against him is dismissed.

Dated at Campbellton, New Brunswick, this 29th day of April, 2016.

Ronald LeBlanc
Provincial Court Judge